87-2113

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

GREGORY JACKSON
Petitioner,

vs.

STATE OF ALASKA
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF ALASKA

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June 24, 1988

I. QUESTIONS PRESENTED FOR REVIEW

1. In a first degree murder case, may a waiver of a defendant's mandatory due process right to an instruction on the lesser-included offense of manslaughter be presumed from a silent trial record where the defendant was neither informed nor aware of such right, where there is no evidence in the trial record of any such tactical decision by counsel, and where neither the court nor the prosecution addressed the issue?

2. What are the constitutional obligations of a State trial judge to instruct on the lesser-included offense of manslaughter and the defense of heat of passion as to first degree murder where said instructions are required as a matter of law by the State statutory scheme?

3. Can the failure to give mandatory instructions on the lesser-included offense of manslaughter and the defense of heat of passion as to a charge of first degree murder be excused where there was no contemporaneous record at trial showing a tactical decision by counsel or the defendant to forego said instructions and merely because, in post conviction proceedings involving allegations of ineffective assistance of counsel, trial counsel advanced a self serving explanation of "trial tactics" as a rationalization for failing to seek such instructions and where the defendant testified he was neither consulted nor concurred in any such purported tactics?

4. Even if a state court may constitutionally allow a defendant to adopt a "all or nothing" gamble and forego

lesser-included instructions and statutory defenses, must the record at trial affirmatively show the defendant was personally addressed and concurred in such tactics?

5. Where a defendant is charged with first degree murder, does it violate the Federal constitutional rights under the Fifth, Sixth, and Fourteenth Amendments to due process, effective assistance of counsel, jury trial, equal protection, and comparable rights under the Alaska Constitution, to fail to instruct on the lesser-included offense of manslaughter and heat of passion as a defense where said instructions are required by the law of the State of Alaska?

6. Where a defendant is charged with first degree murder, does it violate

the Federal constitutional rights to effective assistance of counsel, to equal protection, and to due process under the Sixth, Fifth, and Fourteenth Amendments and comparable rights under the Alaska Constitution where trial counsel fails to investigate or obtain discovery prior to trial; fails to prepare; fails to request instructions on manslaughter as a lesser-included offense and heat of passion as a defense; fails to object to the court's instruction that a unanimous acquittal was required before a lesser-included defense could be considered; fails to voir dire on racial prejudice where a defendant is black; and fails to call crucial exculpatory witnesses?

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF ALASKA

TO: THE HONORABLE CHIEF JUSTICE WILLIAM H. REHNQUIST AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Petitioner, Gregory Jackson, respectfully prays that a Writ of Certiorari issue to review the final Opinion of the Court of Appeals of the State of Alaska entered in this proceeding on February 11, 1988.

II. OPINION BELOW

The Alaska Supreme Court denied a Petition for Hearing in Gregory Jackson, Petitioner v. State of Alaska, Respondent, File No. S-2626, on March 21st, 1988 (Exhibit A in Appendix herewith) in an unreported order. The Court of Appeals of the State of Alaska affirmed Petitioner's conviction on direct appeal from a denial of a post conviction motion for a new trial and for post conviction relief due to ineffective assistance of counsel in Jackson v. State, Slip Opinion No. 781, File No. A-2026, on February 11, 1988. (Exhibit B in Appendix herewith). The case is reported at 750 P.2d 821.[1]

1/ The instant case was actually appealed three times to the Alaska Court of Appeals. The procedural posture of the case is as follows:

III. JURISDICTION

The Entry of Final Judgment of the Supreme Court/Court of Appeals of the State of Alaska was effective on March 21st, 1988, as reflected by the file stamp on the final order by the Alaska Supreme Court denying a Petition for Hearing in Alaska Supreme Court No. S-2626 (Exhibit A in Appendix herewith).

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1. After conviction by jury and prior to sentencing, Mr. Jackson filed, with certain supporting documents, a Motion for New Trial on August 21, 1984, alleging ineffective assistance of counsel and failure to instruct on lesser-included offenses. (Exhibit J in Appendix herewith);

2. The Superior Court on November 6, 1984, summarily denied said motion and refused to conduct an evidentiary hearing (Exhibit E in Appendix herewith);

3. A direct appeal was taken to the Alaska Court of Appeals in Case No. A-805, alleging ineffective assistance of counsel, the failure to instruct on the

A final opinion of the Court of Appeals of the State of Alaska was entered on February 11, 1988,in Slip Opinion No. 781, File No. 2026 (Exhibit B in Appendix herewith). Pursuant to Alaska Supreme Court Rules of Appellate Procedure 302 et. seq., a timely Petition for Hearing in the Alaska Supreme Court was filed on February 26, 1988.

3/ Cont'd lesser-included offense of manslaughter, heat of passion as a defense, and the erroneous instruction with regard to order of deliberations, and the failure to hold a hearing with respect to Appellant's ineffective assistance of counsel claim as required by Barry v. State, 675 P.2d 1292, 1295 (Alaska App. 1984) (Exhibit M in Appendix herewith);

4. In Case No. A-805, the Alaska Court of Appeals reversed and remanded for an evidentiary hearing by Memorandum Opinion and Judgment No. 959 of October 23, 1985, (Exhibit C in Appendix herewith);

Jurisdiction is invoked under 28 U.S.C. ¶1257(3) and Rules 17 to 20 of the United States Supreme Court Rules of Appellate Procedure. The instant petition is timely under Supreme Court Rule 20 since filed within 60 days after the effective date of the Entry of Judgment of the Alaska Supreme Court and the Alaska Court of Appeals.

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5. By written orders of December 23, 1985 and February 21, 1986, the Superior Court continued to refuse to hold an evidentiary hearing and an appeal was taken to the Alaska Court of Appeals in Case No. A-1471 (Exhibit F in Appendix herewith);

6. Subsequently, a new Motion for New Trial and/or Motion for Post Conviction Relief was filed by Mr. Jackson on June 4, 1986, (Exhibit I in Appendix herewith); with new supporting signed affidavits and evidentiary hearings were held. The Superior Court denied said motions and made certain written findings (Exhibit D in Appendix herewith);

7. A new Notice of Appeal was filed in the Alaska Court of Appeals in No. A-2026 from the final denial of the Motion for New Trial and Post Conviction Relief after the evidentiary hearings (Exhibit K in Appendix herewith) and the Appeal in Case No. A-1471 was dismissed insofar as evidentiary hearings had actually been conducted;

8. On direct appeal from final denial of the Motion for New Trial and Motion for Post Conviction Relief as a result of the issues pending from Case No. A-805 and Case No. A-2026, the Court of Appeals issued Slip Opinion No. 781 on February 11, 1988 (Exhibit B in Appendix herewith).

9. A Petition for Hearing was filed in the Alaska Supreme Court from said Court of Appeals Slip Opinion No. 781 in a timely fashion and was denied on March 21st, 1988, (Exhibit A in Appendix herewith) and this Petition for Writ of Certiorari follows.

IV. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the right to due process, effective assistance of counsel, jury trial, and equal protection under the Fifth, Sixth, and Fourteenth amendments to the United States Constitution, and Article I Sections 1, 7, and 11 of the Alaska Constitution.

The case likewise involves the right to have a jury properly instructed as to the lesser-included offense of manslaughter and heat of passion as a defense to first and second degree murder under AS 11.41.100, AS 11.41.110, AS 11.41.120, AS 11.41.115, and AS 11.81.335, and further, under Alaska Rules of Criminal Procedure 30 and 31.

The text of said constitutional provisions, rules and statutes is set out

in the Appendix herewith pursuant to United States Supreme Court Rule 21(f) and 21(k).

V. STATEMENT OF THE CASE

Gregory Jackson was convicted, following a jury trial, of murder in the first degree, a violation of AS 11.41.100. Mr. Jackson shot the decedent, Vernon Jackson (unrelated to Gregory Jackson) in a night club in Anchorage, Alaska, in self-defense when Gregory Jackson correctly perceived that the decedent was attempting to pull a weapon from his inside coat pocket after an altercation involving Gregory Jackson's female companion, Carmelita Danzy, who was the former girlfriend of Vernon Jackson.

Trial Counsel failed to request instructions on the lesser-included offense of manslaughter and heat of

passion as a defense to first and second degree murder which are mandatory instructions under Alaska Law given the factual circumstances of the case. The jury was erroneously instructed that they had to acquit the defendant of first degree murder before considering the charge of second degree murder.

Moreover, the court and the prosecution never discussed the giving of lesser-included offense instructions as to manslaughter or instructions as to heat of passion as a defense, such that it was plain error to fail to do so. No objections to giving such instructions were made by the defendant or defense counsel.

The failure to request a lesser-included instruction was rationalized by the Alaska Courts pursuant

to trial counsel's self serving testimony at a post conviction hearing, that said failure had been a purported tactical choice (Exhibit G in Appendix herewith). Despite these after the fact excuses by trial counsel, there was no statement or evidence on the record at the time of trial that the issue was even discussed and/or contemplated by the court or counsel or the defendant, or that there was any tactical decision by counsel or the defendant to attempt to waive the right to lesser-included offense instructions or instructions as to the defense of heat of passion.

The record is devoid of any testimony by Mr. Jackson that he participated in any such decision, and there is an affidavit in the record stating that he was not informed of these

rights (Exhibit I in Appendix herewith). Trial counsel's testimony on these issues was equivocal (Exhibit G in Appendix herewith).

Although the events at issue and the trial occurred in Anchorage, Alaska, Gregory Jackson was represented by George C. Howard, an attorney from Chicago, Illinois. Mr. Howard travelled to Anchorage solely for purposes of the arraignment and trial and conferred with Petitioner for only approximately 1 hour prior to the commencement of trial.

Mr. Howard did not investigate or begin preparation of the defense case until the night before jury selection began, did not even obtain discovery or police reports until the night before jury selection began, did not review grand jury transcripts until a 30 minute recess

during the course of trial, and conducted no investigation either before or during trial. As a result of this total abrogation of the responsibility to provide effective assistance of counsel, Mr. Howard failed to call crucial exculpatory witnesses who would have testified as follows:

1. The decedent affirmatively left the club in question after the initial contact with the defendant, armed himself with a gun and re-entered the club prepared for combat such that he was the actual aggressor and so as to support the claim of self-defense.

2. The State's sole eye witness to the shooting had actually made a statement the day after the homicide indicating that he believed

that Gregory Jackson killed Vernon Jackson in self-defense and the police had forced the eye witness to testify otherwise.

3. The decedent, Vernon Jackson, had a long standing history and reputation for violence including numerous prior acts of violence which would have been admissible as circumstantial evidence that he was the true aggressor.

Moreover, despite the fact that the defendant is black, the decedent was black, trial counsel Mr. Howard is black, most of the witnesses in the case are black, and the empaneled jury was all white, Mr. Howard totally failed to voir dire jurors on racial or bias issues, even though such practice is customary as part

of the normal practice of defense counsel in the Anchorage area.

Pursuant to United States Supreme Court Rule 21.1(h), the Federal issue as to ineffective assistance of counsel was raised by virtue of a Motion for New Trial filed at the Superior Court level on August 21, 1984, (Exhibit J in Appendix herewith), and was also raised by virtue of an initial appeal taken to the Alaska Court of Appeals in Case No. A-805, (Exhibit M in Appendix herewith).

Pursuant to remand by the Alaska Court of Appeals on October 23, 1985, in Memorandum Opinion and Judgment No. 959, File No. A-805, (Exhibit C in Appendix herewith), further evidentiary hearings were held and the denial of the Motion for a New Trial and for Post Conviction Relief with regard to ineffective assistance of

counsel was again appealed to the Alaska Court of Appeals by Mr. Jackson in Alaska Court of Appeals No. A-2026.

The issues concerning the failure to instruct with regard to lesser-included offenses were raised in the statement of issues at page V and Argument at page 18-20 in Appellant's Opening Brief of April 16, 1985, Case No. A-805 (pages 169 to 178 of Exhibit O in Appendix herewith) and Appellant's Reply Brief of July 5, 1985, Case No. A-805 at pages 2-3, 11-13, 14-15. (pages 181 to 186, 187 to 191, 192 to 194 of Exhibit O in Appendix herewith). The issue with regard to ineffective assistance of counsel was addressed by the Alaska Court of Appeals Memorandum Opinion and Judgment No. 959 of October 23rd, 1985, (File No. A-805) at page 1 to 3 (pages 30 to 35 of

Exhibit C in Appendix herewith) and further, was addressed in the Alaska Court of Appeals Slip Opinion No. 781 of February 11th, 1988,(File No. A-2026 and File No. A-805) at pages 3 to 11 (pages 3 to 27 of Exhibit B in Appendix herewith).

The issue with regard to the failure to request lesser-included offense instructions was addressed at page 5 and 10 of the Alaska Court of Appeals Slip Opinion No. 781 of February 11, 1988, (File No. A-2026 and File No. A-805). (pages 12, and 23 to 24 of Exhibit B in Appendix herewith)

Although the Alaska Court of Appeals made a specific finding that:

> "Howard's investigation in this case was clearly inadequate for a first degree murder charge" Slip Opinion No. 781 of February 11, 1988 at page 6, (page 5 of Exhibit B in Appendix herewith). (Emphasis added).

they nonetheless affirmed the conviction although conceding that:

> In summary we find this to be a close case. We are particularly troubled by Howard's lack of investigation. Id at page 11, (page 25 of Exhibit B in Appendix herewith). (Emphasis added).

Note that in the Court of Appeals Slip Opinion No. 781 of February 11, 1988, at page 7 (pages 17 to 18 of Exhibit B in Appendix herewith), the Court of Appeals specifically acknowledged Mr. Jackson's position that any purported tactical decisions of trial counsel were vitiated by his failure to investigate.

The Alaska Court of Appeals as noted, rationalized the failure to request lesser included offense instructions as a purported "tactical decision" by trial counsel despite the fact that the trial record is devoid of any evidence that Mr.

Jackson was advised of or aware of the right, or that trial counsel, the prosecution, or the court even considered the issue. In particular, the Court of Appeals stated:

> Jackson contends that Howard's failure to request any lesser included offense instructions was ineffective assistance. This case went to the jury on instructions for murder in the first degree and murder in the second degree only. At the evidentiary hearing, Howard testified that he believed that his client had an excellent chance of being totally acquitted. He was afraid if he requested lesser included offenses, the jury might convict his client on one of the lesser included offenses rather than totally acquitting him. Judge Ripley found that this was a reasonable tactical choice. As we have stated before, tactical choices of counsel are entitled to difference. We agree with Judge Ripley that this was a reasonable tactical choice. Slip Opinion No. 781 of February 11, 1988, at page 10 (pages 23 to 24 of Exhibit B in Appendix herewith). (Emphasis added).

The issue with regard to ineffective assistance of counsel and specifically whether it is valid to claim such a retroactive rationalization as to "tactical decisions" was presented to the Supreme Court of the State of Alaska by virtue of Mr. Jackson's Petition for Hearing of February 26, 1988, at pages 1 and pages 9 through 10 (pages 195 to 199 of Exhibit C in Appendix herewith). Given the specific briefing at the Court of Appeals level as to the position that the ineffective assistance of counsel claim included the failure to seek proper instructions, and given the specific petition to the Alaska Supreme Court as to the validity of the rationalization by the Court of Appeals that a post trial claim of a purported "tactical choice" by trial counsel

justified the failure to so instruct, the federal issue was properly preserved at both the Alaska Court of Appeals level and the Alaska Supreme Court level.

VI. ARGUMENT

A. THE FAILURE TO INSTRUCT ON MANSLAUGHTER AND HEAT OF PASSION AS A DEFENSE WAS CONSTITUTIONAL ERROR

The failure of defense counsel to request lesser-included instructions, the failure of the prosecution to seek lesser-included instructions, the failure of the court on its own initiative to give lesser-included instructions, and the failure of defense counsel, the court, and the prosecution to seek and/or instruct as to the heat of passion as a defense, deprived Mr. Jackson of his right to due process, equal protection, effective assistance of counsel, and right to jury

trial under the United States and Alaska Constitutions.

Mr. Jackson was convicted by a jury which was not instructed as to the mandatory lesser-included offense of manslaughter, or further, with respect to the heat of passion defense to first and second degree murder.[2]

Blackhurst v. State, 721 P.2d 645 (Alaska App. 1986), discussed in detail infra at page 26 to 36 holds squarely that such instructions are mandatory with charges and factual circumstances such as those presented in the instant case.

2/ Note further that this denied the defendant his right to jury trial insofar as the failure to correctly instruct the jury deprived the defendant of the "constitutional right to have the jury determine every material issue presented by the evidence" People v. Modesto, 382 P.2d 33 (Cal. 1963).

Defense counsel failed to request modification of the Instruction which stated jurors are required to acquit on the greater offense before considering the lesser.

In Keeble v. United States, this court stated:

> . . . [I]t is now beyond dispute that the defendant is entitled to an instruction on a lesser-included offense if the evidence will permit a jury to rationally to find him guilty of the lesser offense and acquit him of a greater . . . Indeed, while we have never explicitly held that the due process clause of the Fifth Amendment guarantees the right of a defendant to have a jury instructed on a lesser-included offense, it is nevertheless clear that a construction of the major crimes act to preclude such an instruction would raise difficult constitutional questions.

Keeble, 412 U.S. 205, at 208, 212-213, 93 S.Ct. 1993, at 1995, 1997-8 (1973). (Emphasis added).

Moreover, the court in Keeble correctly focused not on questions of tactical maneuvering but on the fundamental right to have a correctly instructed jury.

In Beck v. Alabama, 477 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980), the court again reiterated this theme as to an Alabama law which precluded lesser-included instructions in capital offenses. The court stated:

> [I]t has long been recognized that it can also be beneficial to the defendant [to instruct on lesser-includeds] because it affords the jury a less drastic alternative than the choice between conviction of the offense charged and acquittal . . . This principle was first announced in Stevenson v. United States, 162 U.S. 313, 323, 16 S.Ct. 839, 843, 40 L.Ed. 980:
>
> > A judge may be entirely satisfied ... [of] ... malice ... yet if there be

> any evidence fairly tending to bear upon the issue of manslaughter, it is the province of the jury ...
>
> . . . Although the Rule is permissibly phrased, it has been universally interpreted as granting a defendant a right to a requested lesser-included instruction if the evidence warrants it.

Beck, 437 U.S. at 635-36, 100 S.Ct. at 2388-89. (Emphasis added).

The Court focused on the fundamental correctness of jury instructions, not upon whether lesser charges were requested or opposed by the Government or the defense, and expressly disapproved the argument of the theoretical tactical advantages.

The Supreme Court of California likewise has held:

> The requirement of instructions on lesser-included offenses is based on the elementary

> principle that the court should instruct the jury on every material question. ... [T]he state [has no] legitimate interest in obtaining a conviction of the offense charged where the jury entertains a reasonable doubt of guilt of the charged offense but returns a verdict of guilty of that offense solely because the jury is unwilling to acquit where it is satisfied that the defendant has been guilty of wrongful conduct constituting a necessarily included offense. Likewise, a defendant has no legitimate interest in compelling the jury to adopt an all or nothing approach to the issue of guilt. Our courts are not gambling halls but forums for the discovery of truth.

People v. St. Martin, 463 P.2d at 390 (Cal. 1970). (Emphasis added).

In People v. Geiger, 674 P.2d 1303 (Cal. 1984), the Court stated:

> Instructions on lesser offenses are required because a procedure which affords the trier of fact no option other than conviction or acquittal when the evidence shows that the defendant is guilty of some crime but not

> necessarily the one charged, increases the risk the defendant may be convicted notwithstanding the obligation to acquit if guilt is not proven beyond a reasonable doubt. The pressures which create that risk thus effect the reliability of the fact finding process and thereby undermine the reasonable doubt standard.

Geiger, 674 P.2d at 1307-08 (Emphasis added).

Numerous Alaska cases hold that a trial judge is required to give a lesser included instruction where there is a factual dispute as to an element of the greater offense, such that the jury could acquit on the greater offense or convict on the lesser-included offense. See Christie v. State, 580 P.2d 310 (Alaska 1978); Johnson v. State, 665 P.2d 566, 569 (Alaska App. 1983); Rice v. State, 589 P.2d 419, 420 (Alaska 1979); Elisovsky v. State, 592 P.2d 1221 (Alaska 1979); and

State v. Minano, 710 P.2d 1015, 1016 (Alaska 1985).

As noted, the leading case in Alaska rejecting the purported right of a defendant to "elect" as to certain instructions including lesser-includeds is Blackhurst v. State, 721 P.2d 645 (Alaska App. 1986). See also, Dresnek v. State, 697 P.2d 1059 (Alaska App. 1985).

In Blackhurst, supra, after an exhaustive review of the Alaska statutes relating to murder, self-defense, heat of passion, and manslaughter, in a case with facts squarely on point to the instant one, the court held that heat of passion manslaughter is a lesser-included offense of second degree murder and instructions on same are mandatory:

> Blackhurst was subsequently charged with murder in the second degree. During pretrial

hearings, the state consistently represented that the only issue in this case was whether the killing was justified. The state also referred to Blackhurst's anger over having his job terminated, which according to the prosecution's theory, "[put] him over the edge."

At trial, Blackhurst claimed self-defense. He asserted the defense through his counsel's opening and closing statements and through his taped interview with Troopers McCoy and Holland, which was introduced into evidence during the state's case-in-chief. At the close of trial, the court instructed the jury on murder in the second degree.[1], and on self-defense.[2] Additionally, at the state's request and over Blackhurst's objection, the court instructed the jury that it could consider convicting Blackhurst of the lesser-included offense of manslaughter[3] if it found that Blackhurst acted out of heat of passion[4] rather than in self-defense. In allowing the manslaughter instruction, the trial court concluded that there was sufficient evidence to allow the jury to find that Blackhurst might have acted out of heat of passion after being provoked by

Lane. The trial court reasoned that the jury should be permitted to consider heat of passion manslaughter in the event it elected to reject Blackhurst's claim of self-defense.

On appeal, Blackhurst claims that it was error for the trial court to instruct the jury on heat of passion manslaughter. The threshold question presented by Blackhurst's argument is whether heat of passion manslaughter is a lesser-included offense of second-degree murder. Lesser-included offenses are governed by Alaska Criminal Rule 31(c), which provides:

> Conviction of Lesser Offense. The defendant may be found guilty of an offense necessarily included in the offense charged, or of an attempt to commit either the offense charged or the offense necessarily included therein if the attempt is an offense. When it appears that the defendant has committed a crime, and there is reasonable ground of doubt in which of two or more degrees he is guilty, he

can be convicted of the lowest of those degrees only.

Alaska courts have rejected the strict statutory elements approach to the lesser-included offense instructions and have applied the broader cognate approach. See, Elisovsky v. State, 592 P.2d 1221, 1225-26 (Alaska 1979); Wilson v. State, 670 P.2d 1149, 1151 (Alaska App. 1983); Marker v. State, 692 P.2d 977, 980 (Alaska App. 1984).

[1] Under the cognate approach, the court must examine the elements of the offense, the respective theories of the case, and the evidence presented at trial. Norbert v. State, 718 P.2d 160, 162-63 (Alaska App. 1986). The court must then determine whether, in the context of the case, it would be possible for the jury to find that the accused had committed the greater offense but not the lesser. Id. See also Rivett v. State, 578 P.2d 946, 947 (Alaska 1978). If a finding of guilt on the greater offense would be inconsistent with acquittal on the lesser, and there is a disputed element that distinguishes the greater from the lesser, an instruction on the lesser must be given. Rice

v. State, 589 P.2d 419, 420 (Alaska 1979); Marker v. State, 692 P.2d at 980.

At trial, Blackhurst conceded that all of the statutory elements of murder in the second degree had been established by the state's evidence. He relied exclusively on the theory of self-defense. On appeal, he contends that, because no element distinguishing the greater offense from the lesser was actually disputed, the manslaughter instruction was improper. We disagree.

When Blackhurst raised the issue of self-defense, justification became a disputed factual element that the state was required to disprove beyond a reasonable doubt. Under the revised Alaska Criminal Code, self-defense is included among the various forms of conduct falling under the broad heading of justification. See AS 11.81.300-11.81.450. With the exception of duress and entrapment, conduct amounting to justification is classified in the revised code as a defense. See AS 11.81.300. Under AS 11.81.900(b)(15), defense is defined as follows:

> (15) "defense" other than an affirmative defense means that
>
> (A) some evidence must be admitted which places in issue the defense; and
>
> (B) the state then has the burden of disproving the existence of the defense beyond a reasonable doubt. . . .

The statutory treatment of justification as a defense is reflected in the Alaska Pattern Jury Instruction For Murder in the Second Degree, which was appropriately given in Blackhurst's case:

> A person commits the crime of murder in the second degree if, without justification, and with intent to cause serious physical injury to another person. . . . [Emphasis added.]

. . . [2] Considering the evidence presented at trial, then, it is apparent that the issue of justification was disputed. In support of the second-degree murder charge, the prosecution maintained that Blackhurst's conduct was entirely unjustified. As a fall-back position, the state

sought to show that, at most, the conduct was partially justified as an act committed in the heat of passion. Blackhurst, on the other hand, maintained that his conduct was fully justified as an act of self-defense. Given the evidence presented at trial, a jury might well have decided that Blackhurst did not reasonably believe that it was necessary to use deadly force against Lane in self-defense. The jury might nonetheless have entertained reasonable doubt as to whether Blackhurst had been seriously provoked by Land and had killed him in the heat of passion. See Kirby v. State, 649 P.2d 963, 969 (Alaska App. 1982).

[3] Because Blackhurst's claim of self-defense was predicated exclusively on the theory that Land had attacked Blackhurst with a knife, the jury could not rationally have found that Blackhurst acted in self-defense without also finding that he had been seriously provoked by Lane.[5] Since justification was a disputed factual element distinguishing second-degree murder from manslaughter, the manslaughter charge was properly determined to be a

lesser-included offense of the murder charge under the cognate approach.

---

1. Alaska Statute 11.41.110(a)(1) reads in pertinent part:

> (a) A person commits the crime of murder in the second degree if
> (1) with intent to cause serious physical injury to another person or knowing that the conduct is substantially certain to cause death or serious physical injury to another person, the person causes the death of any person ...

2. Alaska Statute 11.81.335 provides in pertinent part:

> Justification: Use of deadly force in defense of self. (a) Except as provided in (b) of this section, a person may use deadly force upon another person when and to the extent
>
> (1) the use of the nondeadly force is justified under AS 11.81.330; and

(2) the person reasonably believes the use of deadly force is necessary for self-defense against death, serious physical injury, kidnapping, sexual assault in the first degree under AS 11.41.410(a)(1) or (2), sexual assault in the second degree, or robbery in any degree.

(b) A person may not use deadly force under this section if the person knows that, with complete personal safety and with complete safety as to others, the person can avoid the necessity of using deadly force by retreating. . . .

3. Alaska Statute 11.41.120(a)(1) provides in pertinent part:

> (a) A person commits the crime of manslaughter if the person
>
> (1) intentionally, knowingly, or recklessly causes the death of another person under circumstances not amounting to murder in the first or second degree. . . .

4. Alaska Statute 11.41.115 provides in pertinent part:

> (a) In a prosecution under AS 11.41.100(a)(1) or

11.41.110(a)(1), it is a defense that the defendant acted in a heat of passion, before there had been a reasonable opportunity for the passion to cool, when the heat of passion resulted from a serious provocation by the intended victim.

(e) Nothing in (a) or (b) of this section precludes a prosecution for or conviction of manslaughter or any other crime not specifically precluded.

(f) In this section,

. . .

(2) "serious provocation" means conduct which is sufficient to excite an intense passion in a reasonable person in the defendant's situation, other than a person who is intoxicated under the circumstances as the defendant reasonably believed them to be; insulting words, insulting gestures, or hearsay reports of conduct engaged in by the intended victim do not, alone or in combination with each other, constitute serious provocation.

> 5. Sufficient provocation to raise heat of passion includes, inter alia, a sudden angry quarrel, mutual combat, and assault or battery. W. LaFave & A. Scott, Criminal Law, § 76, at 574-75 (1972).

Blackhurst, supra, at 721 P.2d 647-649 (Emphasis added).

In People v. Wickersham, 650 P.2d 311 (Cal. 1982), the California Supreme Court faced the issue of whether the doctrine of "invited error" would be invoked where defense counsel and/or the defendant had not articulated on the contemporaneous trial record a deliberate tactical objection to required instructions at the time of trial. The Court held that with regard to the failure to instruct on second degree murder in a first degree murder case:

> However, because the trial court is charged with instructing the

> jury correctly, it must be clear from the record that defense counsel made an express objection to the relevant instruction. In addition, because important rights of the accused are at stake, it must be clear that counsel acted for tactical reasons and not out of ignorance or mistake.

Wickersham, 650 P.2d at 330. (Emphasis added).

People v. Sedeno, 518 P.2d 913 (Cal. 1974) likewise holds clearly that there is an obligation to instruct on lesser-included offenses even when as a matter of trial tactics, the defendant objects.

Mr. Jackson specifically asserted to the Alaska Court of Appeals in his opening brief of April 16, 1985, at page 20, (page 178 of Exhibit O in Appendix herewith) that failure to give the lesser-included instructions and instructions on heat of passion as a

defense to first and second degree murder was plain error, and this court should so hold.

Neither the defense nor the prosecution has the right to agree to a "all or nothing verdict" and insist that lesser-included offenses not be given. People v. Chamblis, 236 NW.2d 473 (Michigan 1975), holds squarely that such a "all or nothing" approach cannot be adopted by defense counsel.[3]

The dissenting opinion of Chief Justice Rabinowitz and Justice Burke in Dresnek v. State, 718 P.2d 156 (Alaska 1986) is instructive:

3/ For additional cases in Alaska with regard to the necessity of instruction on lesser-included offenses see Kuzmin v. State, 725 P.2d 721 (Alaska App. 1986); Moore v. State, 740 P.2d 472 (Alaska 1987); Komakhuk v. State, 719 P.2d 1041 (Alaska App. 1986).

We have held that a trial court's failure to give an instruction properly requested by the defendant on a lesser-included offense is error. Christie v. State, 580 P.2d 310, 318 (Alaska 1978). We stated the rationale for our ruling as follows:

> [W]hen facts are put in evidence which support instructions as to lesser degrees and they are not given, the jury may be faced with the choice either of acquitting a man who is obviously guilty of some wrong or of finding guilty a man who is not guilty of the crime charged. Id. at 318 (citations omitted).
>
> . . . . The pressure could be enormous . . . to vote to convict on a charge of which [there is] reasonable doubt, rather than to "hold out" and leave a guilty defendant unconvicted. The lesser-included instruction is therefore necessary to ensure that the defendant is "accorded

the full benefit of the reasonable doubt standard," . . . and to protect against "the substantial risk that the jury's practice will diverge from theory." (Emphasis added).

Accordingly, this Court should grant the Petition for Writ of Certiorari pursuant to Rule 17.1(d) and/or Rule 17.1(c) with regard to the crucial issue of whether self serving, after-the-fact rationalization by trial counsel in post conviction evidentiary hearing testimony as to a purported tactical decision to waive, without the permission of the defendant, the right to a lesser-included offense and to an instruction as to heat of passion as a defense to first and second degree murder, can be used to

justify denial of the basic due process right to have a jury so instructed.[4]

B. MR. JACKSON WAS DENIED THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AND THIS COURT SHOULD GRANT A PETITION FOR WRIT OF CERTIORARI AND REVIEW BOTH THE LAW AND THE FACTS.

Strickland v. Washington, 466 U.S. 668 (1964) articulated a two-prong standard to review ineffective assistance of counsel claims, which requires a showing that counsel's performance was deficient and that the defendant was prejudiced.

4/ Note that Lanier v. State, 486 P.2d 981 (Alaska 1971) deals with tactical decisions made in the presence of the jury in the heat of trial by counsel as to waivers of certain substantive rights and does not deal with an attempt outside the presence of the jury to waive basic constitutional rights by failing to ask for appropriate instructions and then attempting to justify same in a post conviction hearing with regard to ineffective assistance of counsel.

In particular, the defendant must show a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id at 694.

These are mixed questions of law and facts which are properly reviewed de novo. Id at 698. See also, United States v. Birtle, 792 F.2d 846, 857 (9th Cir. 1986).

It is sufficient to raise a reasonable doubt that prejudice resulted. Risher v. State, 523 P.2d 421, 424-425 (Alaska 1974).

Kimmelman v. Morrison, 106 S.Ct. 2474, 2580, 2587-89 (1986) held that the failure to investigate and the failure to seek discovery constitute lack of

preparation which puts the defendant at risk notwithstanding vigorous cross examination by defense counsel.

Nealy v. Cabana, 764 F.2d 1173 (5th Cir. 1983) held that the failure to investigate and locate witnesses whose missing testimony might have effected a jury's assessment of credibility is sufficient to meet the Strickland standard. See also, Arnold v. State, 685 P.2d 1261, 1263-64 (Alaska App. 1984).

In the instant matter it is significant that the attempts of the Alaska Court of Appeals to rationalize the clear failure of Mr. Howard to investigate, to obtain police reports or statements of witnesses prior to the night before jury selection, his failure to read the grand jury transcript until the middle of the trial, or to investigate before or

during trial , and his failure to seek mandatory instructions on lesser included offenses as purported "tactical" decisions, ignores the real impact of the omissions. The California Supreme Court has held that counsel's failure to investigate vitiates a purported "tactical" decision rationale advanced after trial.

> . . . while counsel's omissions might have been based on otherwise proper tactical considerations, nevertheless, counsel acted without adequately investigating his client's defense. His decisions relative to the tactics available therefore were not "informed" decisions . . . and so effectively deprived the defendant of the presentation of a potentially meritorious defense.

People v. Shaw, 674 P.2d 759, 762-63 (Cal. 1984). (Emphasis added).

In Strickland this Court stated:

> Strategic choices made after a less or incomplete investigation are reasonable precisely to the extent that reasonable professional judgment supports the limitations on investigation.

Strickland, 468 U.S. at 691. (Emphasis added).

Mr. Howard failed to investigate and call at trial witnesses in three critical exculpatory areas, namely:

1. A witness as to a prior[5] inconsistent statement by the prosecutions' sole eye witness, which prior statement specifically supported Mr. Jackson's claim of self-defense. Compare

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5/ References to the record below are as follows: Trial Transcript is referred to as TTR; post conviction evidentiary hearing with regard to effective assistance of counsel transcript is referred to as HTR.

TTR 397:8 - 398:11 and 410:4-25 with HTR 85:21 - 86:8, 22 and 87:20.

2. That the decedent/alleged victim actually armed himself with a gun in specific preparation to accost the petitioner so as to show that the decedent was the actual aggressor; HTR 67:4-68:13; Slip Opinion at page 8. (pages 19 to 20 of Exhibit B in Appendix herewith).

3. That the decedent/alleged victim had a long standing reputation for violence, and further, routinely acted in an aggressive manner so as to show that he was the aggressor; HTR 196:21-197:6; Slip Opinion at page 9-10.[6]

6/ United States ex rel Cross v. Deboretis, 811 F.2d 1008, 1016 (7th Cir. 1987) held:

> A defendant resting his ineffective assistance of counsel claim on counsel's

In People v. Martinez, 685 P.2d 1203 (Cal. 1984), the California Supreme Court held that a new trial was warranted where a witness was discovered after trial who could have provided possible exculpatory evidence with respect to other wise incriminating testimony and was not discovered or called at trial due to trial counsel's failure to thoroughly investigate. Such evidence and the failure to produce same mandates reversal

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6/ Cont'd

> failure to investigate and locate witnesses must . . . convince the judge that, if found and called at trial those witnesses might have made a difference in the outcome of the case. (Emphasis added).

See also, People v. Shaw, 674 P.2d 759, 762 (Cal. 1984) citing People v. Pope, 590 P.2d 859 (Cal. 1979) as to mere requirement of showing of a potentially meritorious defense.

since it constitutes a critical gap in the prosecution's case. The court concluded that if a jury were to find there was even a reasonable possibility that this testimony was true, that it would be sufficient to raise a reasonable doubt and the trial court could not refuse to grant a new trial merely because of trial counsel's lack of diligence since to do so would be to punish the defendant for his counsel's ineffective performance. Id at 1208-1209.

Accordingly, when one analyzes the numerous errors and omissions of Mr. Howard, it is inescapable that reversal is warranted.

The failure to call the witness Mary Stills as to the decedent arming himself for combat obviously would have impacted the jury's consideration of the

self-defense asserted by Mr. Jackson. This would have served not only as evidence that the decedent was in fact the aggressor, but would have corroborated the defendant Jackson's testimony that the decedent was attempting to pull a gun from his breast pocket at the time of the necessity of exercising deadly force in self-defense.

The witness Hurist Joubert would have directly impeached the sole eye witness Albert Ford, so as to constitute crucial exculpatory evidence as to Mr. Ford's later testimony and support the self-defense asserted.

Clearly evidence of the decedent's prior violent reputation and conduct would have had a significant impact on the jury's consideration of whether he was the aggressor and whether Mr. Jackson's decision that it was

necessary to use deadly force in self-defense was reasonable.

In all likelihood, the failure to seek the mandatory instructions with regard to the lesser-included offense of manslaughter and the defense of heat of heat of passion was even more egregious and prejudicial.

That is, it is totally circular logic and "Catch 22" rationalization for the State, the trial court, and the appellate courts to maintain that although Mr. Jackson admittedly received deficient assistance from Mr. Howard, that the due process violation from the failure to instruct on lesser-included defenses and the defense of heat of passion can be rationalized by Mr. Howard's after-the-fact claim that some tactical decision was involved.

Clearly these failures cannot be said to not have contributed to the verdict since the very reason there is a due process requirement of so instructing the jury is precisely to avoid the possibility that a defendant who is guilty of the lesser offense, but innocent of the greater, will not be convicted merely because the jury is forced with a Hobson's Choice of convicting an innocent man or acquitting a partially guilty one.

Accordingly, pursuant to the United States Supreme Court Rules of Appellate Procedure 17.1(b) and 17.1(c), this Court should grant Certiorari and reverse since the courts of the State of Alaska have decided the important Federal question with regard to the degree of prejudice that may be presumed by a failure of counsel to investigate, call crucial

witnesses, or to seek mandatory instructions in conflict with the relevant holdings of this Court and the California Supreme Court.

Under Strickland, supra; Wickersham, supra; Risher, supra, it cannot be said that these major failings on behalf of Mr. Howard, if rectified, would not possibly have had an impact on the jury's deliberations both with regard to the true nature and actions of the decedent in being the aggressor, and further, with regard to the sole eye witness Albert Ford's perception of the events as in reality being self-defense.

Equally prejudicial and requiring reversal under these cases is the failure to seek mandatory instructions on the lesser-included offense of manslaughter and the defense of heat of

passion as a defense to first and second degree murder.

Further, the Alaska courts have by implication decided the important Federal question of whether post conviction testimony by an ineffective counsel can be used to rationalize the waiver of basic constitutional rights and the right to basic instructions on the law under the due process clause of the United States Constitution.

VII. SUMMARY AND CONCLUSIONS

The Petitioner/Respondent, Gregory Jackson, was convicted by a jury which was misinstructed on the law and was given the Hobson's Choice of either convicting the defendant of a murder for which he is innocent or acquitting him of all conduct despite the fact that they may have felt that he was guilty of

manslaughter as a lesser-included offense under the law of the State of Alaska.

he in no way enjoyed his due process rights and rights under the statutes of the State of Alaska and the Constitution of the United States to an instruction on applicable defenses including heat of passion.

The trial court and the prosecution had an equal obligation with defense counsel to ensure that the jury was properly instructed and the total lack in this record of any evidence or statement at the time of trial of any tactical choice by the trial counsel or the defendant to waive such basic constitutional rights vitiates any post conviction rationalization advanced by trial counsel attempting to justify his own position in after-the-fact evidentiary hearings.

As a matter of law this Court should rule, as has the California Supreme Court, that the record at trial must affirmatively demonstrate a tactical decision by the defendant and his counsel to waive lesser-included offenses even if such waiver is consistent with basic principles of due process. A better position is that no such waiver is even allowable since as noted, courts are not gambling halls and the jury should be properly instructed regardless of attempts by either party to make tactical decisions to modify the rules of law.

Under Rule 17, the Court should grant the Writ of Certiorari with regard to both the issue concerning the effect of such failure to seek basic instructions under the due process clause of the United States Constitution, and further, with

regard to the issue of attempts to avoid the holding in Strickland v. Washington, supra, with regard to the sacred obligation to provide effective assistance of counsel.

Accordingly, the Court should grant the Petition for Writ of Certiorari and Reverse.

Respectfully submitted this 24th day of June, 1988.

WEIDNER AND ASSOCIATES
A Professional Corporation

By: Phillip Paul Weidner
PHILLIP PAUL WEIDNER
Attorney for
Petitioner

STATE OF ALASKA)
) ss
THIRD JUDICIAL DISTRICT)

CERTIFICATE OF SERVICE

I hereby certify, that pursuant to Rule 21, Rule 28.2, Rule 28.5(b) and Rule 33 of the Supreme Court Rules of Appellate Procedure, that I am a member of the Bar of the United States Supreme Court in good standing, and that three copies of the foregoing Petition for Writ of Certiorari to the Supreme Court of the State of Alaska and the Court of Appeals of the State of Alaska were served upon counsel for the Respondent by depositing same in the United States mail at Anchorage, Alaska, first class, postage pre-paid, addressed to:

Robert D. Bacon
Assistant Attorney General
Attorney General's Office
Special Prosecutions and Appeals
1031 West 4th Avenue, Suite 318
Anchorage, Alaska 99501

and further, that three copies of the foregoing Petition for Writ of Certiorari to the Supreme Court of the State of Alaska and the Court of Appeals of the State of Alaska were served upon the Attorney General of the State of Alaska by depositing same in the United States mail, at Anchorage, Alaska, first class, postage pre-paid, addressed to:

Grace Berg Schaible
Attorney General
Attorney General's Office
Box K
Juneau, Alaska 99811

DATED at Anchorage, Alaska, this 24th day of June, 1988.

WEIDNER AND ASSOCIATES
Phillip Paul Weidner &
Associates, Inc.
A Professional Corporation

Phillip Paul Weidner

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(907) 276-1200
Attorney for Petitioner

87-2113

NO._____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

GREGORY JACKSON
Petitioner,

vs.

STATE OF ALASKA,
Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF ALASKA

WEIDNER AND ASSOCIATES
Phillip Paul Weidner &
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A Professional Corporation

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June 24, 1988

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EXHIBIT A.

FINAL ORDER OF THE SUPREME COURT OF THE STATE OF ALASKA DENYING PETITION FOR HEARING IN GREGORY JACKSON V. STATE OF ALASKA, [SUPREME COURT FILE NO. S-2626] EFFECTIVE MARCH 21, 1988

IN THE SUPREME COURT OF THE STATE OF ALASKA

GREGORY JACKSON,	)	Supreme Court No. S-2626
Petitioner,	)	
	)	ORDER
vs.	)	Filed and Entered
	)	APPELLATE COURTS
STATE OF ALASKA,	)	of the STATE OF
	)	ALASKA
Respondent.	)	May 21, 1988
	)	By /s/ Deputy

Court of Appeals No. A-2026
Trial Court No. 3ANS-83-07223 Cr.

Before: Matthews, Chief Justice, Burke, Compton and Moore, Justices. (Rabinowitz, Justice, not participating).

On consideration of the petition for hearing, filed on February 26, and the response to the petition, filed on March 3, 1988,

IT IS ORDERED:

The petition for hearing is

denied.

Entered by direction of the court at Anchorage, Alaska on March 17, 1988.

/S/ DAVID A. LAMPEN

Clerk of the Supreme Court

EXHIBIT B.

FINAL OPINION OF THE COURT OF APPEALS OF THE STATE OF ALASKA DENYING MERIT APPEAL IN GREGORY JACKSON V. STATE OF ALASKA [OPINION NO. 781, FILE NO. A-2026, FEBRUARY 11, 1988, 750 P.2d 821]

NOTICE: This opinion is subject to formal correction before publication in the Pacific Reporter. Readers are requested to bring typographical or other formal errors to the attention of the Clerk of the Appellate Courts, 303 "K" Street, Anchorage, Alaska 99501, in order that corrections may be made prior to permanent publication.

THE COURT OF APPEALS OF THE STATE OF ALASKA

GREGORY JACKSON, Appellant,	File No. A-2626
	O P I N I O N
v.	
STATE OF ALASKA, Appellee,	[No. 781 - February 11, 1988]

Appeal from the Superior Court of the State of Alaska, Third Judicial District, Anchorage, J. Justin Ripley, Judge.

Appearances: Thomas A. Flippen,

II, Boyko, Boyko, Dennis, Baldwin & Breeze, Anchorage, for Appellant. Robert D. Bacon, Assistant Attorney General, Office of Special Prosecutions and Appeals, Anchorage, and Grace Berg Schaible, Attorney General Juneau, for Appellee.

Before: Bryner, Chief Judge, Coats and Singleton, Judges.

COATS, Judge.

Gregory Jackson was convicted, following a jury trial, of murder in the first degree. AS 11.41.100. Superior Court Judge J. Ripley sentenced Jackson to fifty years' imprisonment. Jackson is eligible for parole after twenty years pursuant to AS 12.55.125. Following his conviction and sentencing, Jackson filed a motion for a new trial based on his contention that he received ineffective assistance of counsel at his trial. Following an evidentiary hearing in the trial court, Judge Ripley denied Jackson's

new trial motion. Jackson appeals to this court from the denial of his new trial motion. He also argues that his sentence was excessive.

FACTS

During the early morning hours of November 10, 1983, Gregory Jackson and a female companion, his codefendant, Carmelita A. Danzy, aka Carmelita A. Jones, went to Newkirk's, an after-hours club in the Fairview area of Anchorage. Newkirk's has a reputation for drugs, prostitution and violence. Gregory Jackson customarily armed himself when going to such places.

Inside, Danzy was approached by Vernon Jackson, her former boyfriend. Vernon Jackson was not related to Gregory Jackson. Vernon Jackson wanted to talk to Danzy. Danzy followed Vernon Jackson into the bathroom for a private conversation. After a short time, Gregory Jackson went to the bathroom to check on Danzy. Gregory Jackson stood in the doorway and told Danzy to "talk outside." Danzy left

the bathroom, leaving the two Jacksons to face each other.

According to Albert Ford, who was present in the bathroom, just as Danzy left, Vernon Jackson moved towards Gregory Jackson. Vernon reached for Gregory's hand which was inside his jacket. Ford testified that Gregory Jackson then pulled a gun and fired two shots. Gregory Jackson fired twice more as Vernon Jackson tried to leave the bathroom.

Sherry Newkirk, the bartender, testified that she heard two shots. She then saw the bathroom door open and saw Vernon Jackson coming out. She then heard two more bullets. A pathologist testified that Vernon Jackson's body was hit by three bullets. One entered the upper chest and passed through the heart. Another bullet entered Vernon Jackson's right side and exited his chest. A third

entered his lower back and passed through his abdomen. A fourth shot hit the right sleeve of Vernon Jackson's coat but did not strike him.

Gregory Jackson, however, testified that Vernon Jackson had moved towards him in a menacing manner while reaching inside his own jacket. During the brief struggle, Gregory Jackson pinned Vernon Jackson's hand against his chest and knocked him off balance. This allowed Gregory Jackson time to pull his own gun. Thus, when Vernon Jackson once again came towards Gregory Jackson, Gregory Jackson said he fired four shots.

Vernon Jackson died from the gunshot wounds. Gregory Jackson argued at trial that he acted in self-defense. A .22 caliber automatic pistol, with four rounds in the clip, was found in Vernon Jackson's pocket shortly after the

homicide. The pistol did not have a round chambered. In order for the pistol to be fired, the slide would have to be pulled back and released to chamber a round.

DISCUSSION

The Alaska standard for determining whether a defendant is entitled to a new trial based on ineffective assistance of counsel is set forth in Risher v. State, 523 P.2d 421 (Alaska 1974). In Risher, the Supreme Court of Alaska established a two-prong test which a defendant must meet to obtain a new trial based on a claim of incompetence of counsel. First, the defendant must establish that defense counsel's overall performance did not conform to the requisite stand of

competence.[1] Second, the defendant must create a reasonable doubt that the lack of competency contributed to the conviction. Id. at 425. The federal test for whether a defendant is entitled to a new trial based on a claim of ineffective assistance of counsel is set forth in Strickland v. Washington, 466 U.S. 668 (1984). The Strickland court articulated a two-prong standard similar to the standard which the Alaska Supreme Court established in Risher. In Strickland, the court stated:

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so

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[1] "All that is required of counsel is that [counsel's] decisions, when viewed in the framework of trial pressures, be within the range of reasonable actions taken by an attorney skilled in criminal law. . . . " 525 P.2d at 424.

serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland, 466 U.S. at 687.

In Strickland, the court placed the following burden on the defendant to show prejudice: "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694. Although the federal and Alaska tests for obtaining relief based on ineffective assistance of counsel are

similar, the defendant has a lesser burden of showing prejudice under the Alaska test. Wilson v. State, 711 P2d. 547, 549 (Alaska App. 1985).

Jackson argues that he received ineffective assistance of counsel based on his attorney's failure to properly investigate and prepare for trial, his attorney's failure to call an allegedly critical witness, his attorney's failure to voir dire jurors with respect to their racial attitudes, and his attorney's failure to ask for lesser-included offense instructions.

Jackson was represented at trial by John C. Howard, an experienced criminal defense attorney from Illinois. Howard came to Anchorage to confer with Jackson at the time of arraignment, then returned to Chicago. A jury trial was held in Anchorage in March 1984, in front of Judge

Ripley. After Jackson was convicted, Howard testified at an evidentiary hearing on Jackson's motion for a new trial. Howard testified that he had been practicing law for twenty-five years and, during that time, had averaged more than one murder or manslaughter trial per month, totaling several hundred homicide trials. From the record, it appears that Howard is highly regarded as a criminal defense attorney in Illinois, particularly in homicide cases.

At the February evidentiary hearing, Howard testified that after his initial discussion with jackson, and based upon his prior dealings with Jackson, he was satisfied he could prevail at trial by arguing that Jackson had acted in self-defense. Although the district attorney's office apparently sent copies of the police reports to Howard, Howard stated

that he had not seen any discovery materials prior to arriving in Alaska, just before trial. He added that he did no investigation and seriously underestimated the strength of the state's case. Howard stated that his failure to investigate the case and to request additional time to seek other witnesses was a disservice to Jackson.

This court has formally cited with approval the American Bar Associations's Standards relating to the defense function in the context of an ineffective assistance of counsel case. Arnold v. State, 685 P.2d 1261, 1265, (Alaska App. 1984). Those standards state:

> It is the duty of the lawyer to conduct a prompt investigation of the circumstance of the case and to explore all avenues leading to the facts relevant to the merits of the case and the penalty in the event of

> conviction. The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to the lawyer of facts constituting guilt or the accused's stated desire to plead guilty.

I Standards for Criminal Justice, Sec. 4-4.1 (Approved Draft 1982).

Howard's investigation in this case was clearly inadequate for a first-degree murder charge. Consequently, we have reviewed the record with particular care to determine whether Jackson was prejudiced.

At the evidentiary hearing on his new trial motion, Jackson presented several witnesses whom he claimed should have been called at his trial. Judge Ripley conducted the actual trial and observed the witnesses testify at the post-conviction relief hearing. Thus, his

findings are certainly entitled to considerable deference. The questions of whether a defense counsel's performance was adequate and whether prejudice has been established, however, are mixed questions of law and fact. Strickland, 466 U.S. at 698. Therefore, given the inadequate investigation in this case, we have independently scrutinized the testimony of the witnesses presented at the evidentiary hearing.

At the evidentiary hearing, Hurist Joubert testified that Albert Ford, the state's major eyewitness to the events surrounding the shooting, had made a statement the day after the homicide indicating that he believed that Gregory Jackson had killed Vernon Jackson in self-defense. Joubert also testified that Ford had said that the police had forced him to testify against his will. Joubert had

formerly been convicted of crimes of dishonesty. Joubert had been in jail with Gregory Jackson, and the state argued that he had the chance to fabricate testimony favorable to Jackson.

The record establishes that the decision not to call Joubert was a tactical choice on the part of Howard. Howard testified that he was aware of Joubert's potential testimony at the time of trial, but he concluded that it would have been a waste of time to call him as a witness. Tactical choices of counsel are given great deference. "[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Strickland, 466 U.S. at 690.

Jackson argues that Howard's tactical decisions in this case are tainted by his

lack of investigation. Judge Ripley found, however, that there had been a very thorough police investigation of the case which was set out in the police reports provided by Howard. Furthermore, Judge Ripley found that in spite of Howard's late preparation, Howard had the opportunity to conduct further investigation during the recess of the trial between Friday, March 16, 1984, when the state rested around noon, and Monday, March 19, 1984, when the defense began its case. Neither of these findings is challenged on appeal. Given these facts, it appears that Howard's tactical decision not to call Joubert was based on an adequate knowledge of the case. Joubert was certainly not an eyewitness to the shooting, and his credibility concerning whether Ford actually made the statement attributed to him is questionable. Under

these circumstances, we conclude that the tactical decision not to call Joubert did not constitute ineffective assistance of counsel.

At the evidentiary hearing, Jackson presented Louis Howard as a witness. Louis Howard testified that Mary Stills stated that Vernon Jackson left Newkirk's shortly before the homicide to retrieve his firearm from a car. Stills, however, testified that she could not remember that incident. Jackson argues that this testimony would tend to establish that Vernon Jackson armed himself specifically for the encounter with Gregory Jackson. In evaluating this testimony, Judge Ripley pointed out that Vernon Jackson was found in possession of a loaded firearm following the homicide. He concluded that it was not particularly material whether he had gone out to the car to obtain a

firearm after seeing Gregory Jackson inside Newkirk's.

The testimony concerning whether Jackson got the firearm from the car was not particularly persuasive and did not directly establish that Vernon Jackson went to get the gun after seeing Gregory Jackson. Louis Howard was impeached with a 1984 conviction for multiple counts of forgery. It was also established that Louis Howard had been incarcerated with Gregory jackson between the time of Jackson's first trial and the time Louis Howard came forward as a witness. We agree with Judge Ripley that it does not appear that this testimony would have been particularly material.

Tyrone Brown and Calvin Chatman also testified at the hearing. Chatman testified that he was present at the scene of the crime. The state, however, showed

that Chatman was in jail on the date the crime was committed. Brown, Chatman, and Louis Howard testified that Vernon Jackson had a reputation as a cocaine dealer. Brown, Chatman, Joubert, and Larry Cleveland testified that Vernon Jackson had a reputation for violence. Judge Ripley concluded that Vernon Jackson's reputation as a cocaine dealer would not be admissible at trial. This appears to be a sound ruling. Whether or not Vernon Jackson was a cocaine dealer does not appear to be relevant to any issue at trial. Gregory Jackson testified at trial that he did not know Vernon Jackson and was not aware of his reputation for violence. Thus, evidence of Vernon Jackson's reputation for violence would not have been admissible to show Gregory Jackson's state of mind.

The testimony could have been

admissible, however, as circumstantial evidence that Vernon Jackson was the initial aggressor. In evaluating this testimony, Judge Ripley concluded that Vernon Jackson's character had already been adequately established at trial by the testimony of witnesses, by his presence in Newkirk's, and by the fact that he was carrying a concealed firearm. Judge Ripley concluded that the reputation for violence testimony would have been cumulative and not particularly productive. He concluded that Howard had chosen to base his case primarily on the testimony of his client, and the cross-examination of the state's witnesses. all of the witnesses who testified as to Vernon Jackson's reputation for violence had been confined with Gregory Jackson prior to coming forward with their testimony. Furthermore, Cleveland and

Chatman had felony convictions for crimes of dishonesty.

It appears that Vernon Jackson's reputation for violence was established to a large degree by the facts of the case. It also appears that Howard was aware that he could have obtained further information as to Vernon Jackson's reputation for violence, but made a tactical choice not to do so. We agree with Judge Ripley that the failure to find or call these witnesses would not have influenced the jury's decision in this case, and thus did not constitute ineffective assistance of counsel.

Jackson contends that Howard's failure to request any lesser-included offense instructions was ineffective assistance. This case went to the jury on instructions for murder in the first degree and murder in the second degree

only. At the evidentiary hearing, Howard testified that this was a tactical choice. He believed that this client had an excellent chance of being totally acquitted. He was afraid that if he requested lesser-included offenses, the jury might convict his client of one of the lesser-included offenses rather than totally acquitting him. Judge Ripley found that this was a reasonable tactical choice. As we have stated before, tactical choices of counsel are entitled to deference. We agree with Judge Ripley that this was a reasonable tactical choice.

Jackson further contends that Howard was ineffective because he chose not to voir dire the jury on racial issues. Vernon Jackson, the victim, was black. Moreover, Gregory Jackson, Howard, and the major witnesses in the case are black. At

the beginning of jury voir dire, the prosecutor asked the jurors a question concerning any racial attitudes. At the evidentiary hearing, Howard testified that, based upon his experience, he decided that it was not necessary to voir dire the issue of race. He stated that people normally do not admit any racial prejudice. He believed that it was best not to question on this issue. Judge Ripley found that this was a reasonable, tactical choice. We agree.

In summary, we find this to be a close case. We are particularly troubled by Howard's lack of investigation. We have therefore given this record particularly close scrutiny to determine whether Jackson was competently represented and received a fair trial. Except for his lack of investigation, it appears that Howard was an experienced and

capable attorney. Although Howard may have initially underestimated the state's case, he had a significant period of time over the weekend, in the middle of the case, after the state rested. Howard indicated that he was aware of Joubert's potential testimony, and he was aware of the possibility of establishing Vernon Jackson's reputation for violence. It appears that he made reasonable, tactical choices not to pursue these possibilities, choosing instead to try the case based on the witnesses who were present at Newkirk's.

Gregory Jackson certainly had a triable case of self-defense based mainly upon Vernon Jackson's possession of a loaded firearm. It appears, however, that he was convicted based upon the eyewitness testimony of Albert Ford and Sherry Newkirk, the fact that Vernon Jackson's

weapon did not have a round in the chamber, and the location of the bullet entry wounds in Vernon Jackson's body. it does not appear that further investigation by counsel would have undermined this evidence.

The best indication of whether an attorney's failure to investigate a case resulted in prejudice to a defendant lies in the nature of the evidence that is presented in the post-conviction relief hearing. We have independently reviewed the evidence that Gregory Jackson claims should have been presented at this trial. We find, in agreement with Judge Ripley, that this evidence does not appear to be sufficiently material to grant a new trial based on incompetence of counsel.

Finally, Jackson argues that his sentence was excessive. Jackson was thirty-seven years old at the time of

sentencing. He had three prior felony convictions: a Mann Act violation, possession of a controlled substance, and possession and distribution of heroin. He also had a misdemeanor conviction for unauthorized use of a weapon and unlawful possession of ammunition. All of these convictions took place from 1971 to 1973. Jackson completed parole on his latest felony conviction in 1981, two years before committing the present offense.

The maximum sentence for murder in the first degree is ninety-nine years. In Riley v. State, 720 P.2d 951, 952 (Alaska App. 1986), we pointed out that Alaska courts have consistently approved the imposition of maximum sentences for murder in the first degree. Given Jackson's age, his prior record, and the seriousness of the present offense, we conclude that the fifty-year sentence which Judge Ripley

imposed in this case was not clearly mistaken.

The judgment of the superior court is AFFIRMED.

EXHIBIT C.

MEMORANDUM OPINION AND JUDGMENT OF THE COURT OF APPEALS OF THE STATE OF ALASKA IN GREGORY JACKSON V. STATE OF ALASKA REMANDING TO SUPERIOR COURT FOR FURTHER PROCEEDINGS [MOJ NO. 959, FILE NO. A-805, OCTOBER 23, 1985, UNREPORTED]

THE COURT OF APPEALS OF THE STATE OF ALASKA

GREGORY JACKSON, Appellant,	)	File No. A-805
v.	)	MEMORANDUM OPINION
STATE OF ALASKA, Appellee.	)	AND JUDGMENT* [No. 959 - October 23, 1985]

Appeal from the Superior Court of the State of Alaska, Third Judicial District, Anchorage, J. Justin Ripley, Judge.

Appearances: Thomas A. Flippen, II, Boyko, Davis & Dennis, Anchorage, for Appellant. Robert D. Bacon, Assistance Attorney General, Office of Special Prosecutions and Appeals, Anchorage, and Norman

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*Entered pursuant to Appellate Rule 214 and Guidelines for Publication of Court of Appeals Decisions (Court of Appeals Order No. 3).

C. Gorsuch, Attorney General, Juneau, for Appellee.

Before: Bryner, Chief Judge, Coats, Judge, and Katz, Superior Court Judge.** [Singleton, Judge, not participating.]

COATS, Judge.

Gregory Jackson was found guilty following a jury trial of murder in the first degree. Superior Court Judge J. Justin Ripley sentenced him to fifty years. On August 21, 1984, he moved for a new trial pursuant to Criminal Rule 35(c)(1), arguing that his conviction was the result of ineffective assistance of counsel. His motion was supported by a memorandum of law, and the affidavits of his new attorney and an investigator retained on his behalf. Also accompanying the motion were the statements of five

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**Katz, Superior Court Judge, sitting by assignment made pursuant to Article IV, Section 16 of the Constitution of Alaska.

individuals who Jackson alleged were important potential witnesses his trial counsel failed to interview. The statements were signed at the bottom by the potential witnesses, followed by the notarized signature of the investigator who swore each statement was read and signed in his presence. Jackson's complaints encompass not only trial counsel's performance at trial, but also his pretrial and post-trial performance.

Superior Court Judge J. Justin Ripley ruled on the motion by order stating only:

> Upon consideration of defendant's Motion for New Trial IT IS ORDERED that defendant's Motion for New Trial is DENIED.

Jackson moved for reconsideration. The state opposed reconsideration arguing, among other things, that Jackson had not complied strictly with the procedure set

forth in Barry v. State, 675 P.2d 1292, 1296 (Alaska App. 1984), since the sworn statements of the five potential witnesses were not really affidavits. Reconsideration was not granted. Because Judge Ripley summarily disposed of the motion, we do not know whether he denied the motion for technical or substantive reasons.

The state concedes that Hampton v. Huston, 653 P.2d 1058 (Alaska App. 1982), requires that the superior court's dismissal of Jackson's application for post-conviction relief must be reversed, and the case remanded. See also Wood v. Endell, __ P.2d ___ Op. No. 486 (Alaska App. June 18, 1985). Our independent review of the proceedings shows that this concession is well-founded. See Marks vs. State, 496 P.2d 66, 67-68 (Alaska 1972).

It appears to us that on remand the

court will be required to conduct a hearing under Barry v. State, 675 P.2d 1292 (Alaska App. 1984). In Wood we stated:

> It is settled that a claim of ineffective assistance of counsel is one that generally requires an evidentiary hearing to determine whether the standard adopted in Risher v. State, 523 P.2d 421 (Alaska 1974), was met by counsel's performance. Barry v. State, 675 P.2d 1292 (Alaska App. 1984). Particularly where, as here, it is the pretrial and post-trial performance of counsel as well as the performance during trial that is specifically alleged to have been inadequate, it is not sufficient that the trial judge found counsel's performance as observed in the course of trial to be adequate.

Op No. 486 at p.2-3. This case is remanded for further proceedings consistent with Hampton v. Juston, 653 P.2d 1058 (Alaska App. 1982) and Wood v. Endell, __ p.2d ___, Opinion No. 486

(Alaska App. June 18, 1985) and Barry v. State, 675 P.2d 1292 (Alaska App. 1984).[1]

REMANDED.

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[1] In this appeal Jackson has argued that his sentence is excessive. The parties to this appeal appear to agree that it is not imperative for us to decide the sentence appeal at this time. We assume that if Judge Ripley denies Jackson's motion for post-conviction relief, that Jackson will again appeal and we can consider his sentence appeal at that time. If Judge Ripley grants Jackson's motion for post-conviction relief it will have been unnecessary for us to decide Jackson's sentence appeal since even if he is reconvicted he will be resentenced. We therefore conclude that we will not decide Jackson's sentence appeal at this time.

EXHIBIT D.

WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW OF SUPERIOR COURT IN STATE OF ALASKA V. GREGORY JACKSON, CASE NO. 3AN-S83-7223 CR. DATED APRIL 7, 1987 DENYING DEFENDANT'S MOTION FOR NEW TRIAL DATED AUGUST 24, 1984 [EXHIBIT J] MOTION FOR POST-CONVICTION RELIEF BASED ON INEFFECTIVE ASSISTANCE OF COUNSEL AND MOTION TO CALENDAR EVIDENTIARY HEARING RELATING THERETO DATED JUNE 4, 1986 [EXHIBIT I HEREWITH] [APPEALED TO THE COURT OF APPEALS OF THE STATE OF ALASKA, FILED NO. A-2026]

IN THE SUPERIOR COURT FOR THE

STATE OF ALASKA THIRD JUDICIAL DISTRICT

STATE OF ALASKA)
)
Plaintiff,)
)
vs.)
)
GREGORY JACKSON)
)
Defendant.)
)

Case No. 3AN-S83-7223 CR

STATE'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

The state proposes that the

court adopt the following findings of fact and conclusions of law regarding Gregory Jackson's claim that his lawyer, George C. Howard, rendered him ineffective assistance and that that prejudiced his defense.

General Conclusions and Findings

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/S/

1. Under Risher v. State, 523 P.2d 421 (Alaska 1974), and Strickland v. Washington, ___U. S.____, 104 S. Ct. 2052 (1984) a defendant alleging ineffective assistance of counsel must establish, first, that counsel's conduct either generally throughout the trial or in one or more specific instances did not conform to the standard of competence displayed by one of

ordinary training and skill in the criminal law; and, second, that the lack of competency contributed to the conviction, See 523 P.2d at 425, 1045 S. Ct. at 2064-69.

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/S/

2. The court concludes that the defendant has not shown either prong of Risher; or Strickland: 1) the conduct of trial counsel, George C. Howard of Chicago, Illinois, was not below the standard of a lawyer reasonably skilled in the practice of criminal law and 2) even if there was substandard conduct, the court finds, beyond a reasonable doubt, that it did not contribute to the

conviction.

Mr. Howard's Representation of the Defendant

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3. Gregory Jackson was charged with murder in the first degree for shooting Vernon Jackson to death at an after-hours club, /s/ Newkirk's, on November 10, 1983.

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4. The defendant Jackson was defended by George C. Howard, an attorney admitted to practice in Illinois, /s/ and Alaska per ARCP 81 and has defended several criminal cases in Alaska /s/.

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/S/

5. George Howard is an attorney of approximately 25 years of experience. He has tried, by his estimation, one homicide case (first degree murder, second degree murder or manslaughter) each month for the past twenty-five years. He /s/ testified without contradiction that he is regarded by judges and his fellow lawyers in Chicago as one of the best criminal defense lawyers in homicide cases in Chicago.

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6. George Howard has represented Gregory Jackson before and, based on that experience, /s/ from which he concluded G. Jackson related

credible information upon which to base defense theories /s/, chose in this case to rely on Gregory Jackson's testimony about of the facts surrounding charges brought against him to prove self-defense.

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7. George Howard met with and talked to the defendant Gregory Jackson for no more than a few hours in November, 1983 and then did not meet him again until trial on March 13, 1984.

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8. The District Attorney's Office had mailed Mr. Howard copies of the police reports in compliance with the discovery

rules in December, 1983.

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9. Notes on the face of Mr. Howard's file in the handwriting of an experienced legal secretary from Mr. Howard's office having 20 years of experience indicate that the police reports were received by his office in January, 1984.

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10. Mr. Howard testified that he in fact did not receive the police reports in December, 1983 or January, 1984, but only received them and read them the night before trial commenced, when he arrived in Anchorage and was given a copy by the District

Attorney's Office. He testified that he read the complete reports the night before the trial commenced.

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11. The court believes Mr. Howard's testimony about receiving and reading the reports the night before trial.

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12. Mr. Howard rendered his opinion that his performance at trial was above the standard of competence displayed by one of ordinary training and skill in the criminal law, and the court finds that his performance was above that shown by the average lawyer reasonably skilled in the

practice of criminal law based both on Mr. Howard's opinion and on the court's observation of his performance during trial.

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13. The court finds that, despite Mr. Howard's late preparation, he had an opportunity to conduct investigation during the recess of the trial between Friday, March 16, 1984, at approximately noon when the state rested and Monday, March 19, 1984, when the defense began its case.

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/s/

14. The court finds that Mr. Howard adopted a strategy focusing on the eye-witnesses

who were inside the bathroom at Newkirk's where the shooting occurred; those witnesses were Albert Ford, Alonzo Lang, Carmelita Danzy and Gregory Jackson, all of whom testified at trial.

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/S/

15. The court finds that Mr. Howard had adequate time to conduct additional investigation (such as finding witnesses as to the victim's reputation for violence) had he chosen to adopt such a strategy, but he chose to follow a strategy of focusing on the witnesses who were inside the bathroom.

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16. At the time the jury retired to deliberate, Mr. Howard felt he had performed far above the standard of a lawyer reasonably skilled in the practice of criminal law and was confident of an acquittal.

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17. Following the verdict, a post-conviction petition was filed; copies of the affidavits which accompanied the petition (or statements substantially similar to those affidavits) were mailed to Mr. Howard for his review.

Evidence at the Post-Conviction Hearing

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18. The court held a hearing on

the post-conviction petition on February 25, 1987, and heard the testimony of witnesses and received stipulations as to evidence.

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/S/

19. The court heard the testimony of George C. Howard. It also heard from five witnesses who have been in jail with Gregory Jackson since his conviction: Calvin Chatman, Hurist Joubert, Larry Cleveland, Tyrone Brown, and Louis Howard. The court also heard the testimony of Mary Stills, telephonically.

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20. Mr. George Howard testified

that he had not conducted any investigation (independent of police investigation or his interview with the defendants Jackson and Danzy).

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21. The court finds that there was a very thorough police investigation of case; the police reports were placed in evidence as an exhibit in the proceedings; the police reports show that the following persons were inside Newkirk's at the time of the shooting: Alonzo Lang, Albert Ford, Eddie Lee Patterson, Mary Stills, Beverly Jean Jones, Eddie Walker, Sheralyn Newkirk, Marketta Joles, Roy L. Jackson, the

victim Vernon Jackson, and the defendants Carmelita Danzy and Gregory Jackson.

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/S/

22. Of these inside Newkirk's, the only witnesses inside the bathroom where the shooting occurred were the victim Vernon Jackson, Albert Ford, Alonzo Lang, Carmelita Danzy and Gregory Jackson. All testified at trial except the victim, who had been killed.

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/S/

23. At the hearing the defendant Jackson called two witnesses who claimed to have been inside Newkirk's after-hours joint at the time of the

shooting: Mary Stills and Calvin Chatman. THe police reports did not indicate that Calvin Chatman had been at Newkirk's that night.

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24. The court finds the testimony of Calvin Chatman to be incredible /s/. Chatman claims to have been inside Newkirk's on November 10, 1983, to see the shooting, but was in fact in jail at the Cook Inlet Pretrial Facility. Based on court records and jail records in evidence before the court, Calvin Chatman was jailed on October 24, 1983, and remained there until November 17, 1983 (except for court appearances).

He could not possibly have seen the events he claims to have seen.

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25. The court has independently reviewed the court file in Calvin Chatman's case and seen his claim that he had been released on bail on November 10, 1983, is contradicted by the court record.

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26. The defense claims that Mary Stills could have testified that the victim Vernon Jackson went to retrieve his firearm from outside in a car after entering Newkirk's. She did not remember that, but Louis Howard

claims she told him that */s/ This is contradicted by Ms. Stills testimony that Vernon Jackson arrived at Newkirk's in her company in her car and that he did not have a gun /s/.* Even if the court accepts that that is the case, it finds that that would not have affected the verdict; a firearm was found on the victim Vernon Jackson when police arrived following the shooting and that fact was made known to the jury and argued by counsel at trial; the particular manner in which the firearm got into the defendant's possession is inconsequential.

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/S/

The defendant also claims that

evidence shows the victim Vernon Jackson went to get his firearm after seeing Carmelita Danzy and Gregory Jackson inside Newkirk's and that this demonstrates an intent on his part to arm himself to prepare to meet them.

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There is no credible testimony to the effect that he went to get the gun <u>after</u> seeing Carmelita Danzy and Gregory Jackson as opposed to "before" seeing them.

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Louis Howard has convictions for crimes involving dishonesty and was in jail and spoke with the

defendant Jackson before his testimony.

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/S/

27. The court finds that the testimony of Tyrone Brown and Larry Cleveland as to their opinion of Vernon Jackson's reputation as a cocaine dealer would not have been admissible at trial.

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/S/

28. The court finds that Mr. Brown and Mr. Cleveland's opinion that the victim had a reputation for violence would have been admissible but would not have affected the verdict. The evidence would not have been admissible to show the

reasonableness of the defendant Jackson's conduct, because the defendant did not know the victim. At most, the evidence was admissible to show who was the initial aggressor. The court reaches the conclusion that their opinions would have no effect because (1) both Tyrone Brown and Larry Cleveland were in jail four to six months before the shooting and rendered their opinions based on experience years beforehand so that their knowledge of his reputation was at a substantially earlier time than the shooting and (2) both were confined in the same institution that Gregory Jackson was confined in and both had

opportunities to confer with him and to fabricate a story before they came forward to testify.

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29. The court does not believe the testimony of Brown or Cleveland.

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/S/

30. The testimony of Hurist Joubert to the effect that the state's witness Albert Ford, made statement that he was forced to testify by prosecutors and police, the court finds, would not have affected the verdict.

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/S/

The court credits George

Howard's testimony that he was aware of that information at the time of trial. The court concludes that any failure to utilize it or to call Hurist Joubert to establish it independently would not have affected the verdict (1) because Albert Ford was already impeachable by inconsistencies in his prior statements to the police and Mr. Howard ably cross-examined him and (2) because the circumstances under which Albert Ford came to the police contradict any claim that he was forced to testify: from the statement of Officer Paul Schwartz of the Anchorage Police Department which was admitted by stipulation, Albert Ford called

through a Crime Stopper's telephone line to report that he was a witness; he went to the police; the police did not go to him to force him to give a statement; he chose Officer Schwartz because Officer Schwartz was the husband of his boss at the restaurant where he worked as a dishwasher or a cook.

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In addition, Joubert had a record of convictions for crimes of dishonesty for which he was in jail with the defendant and they had opportunity and motive to fabricate. This evidence would have been admissible at trial to

impeach his testimony.

Summary of Conclusions and Findings

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/S/

31. Mr. Howard testified that his reasonable failure to investigate /s/ several theories expressed by Defendant's present counsel /s/ affected the verdict.

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32. The court does not credit Mr. Howard's opinion on the effect of his failure to investigate. The court does not credit Mr. Howard's opinion (1) because Mr. Howard admitted that he had done no independent investigation to test the truthfulness of the affidavits

he had been shown. (It would be unreasonable for Mr. Howard to believe that the /S/ incredible testimony of Calvin Chatman would have helped his client) and (2) because Mr. Howard uncritically accepted the proposition that the victim Vernon Jackson's reputation for being a cocaine dealer would automatically come into evidence (under circumstances that the court concludes it would not)./s/

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/S/

33. The court also finds that Mr. Howard was biased because he was personally embarrassed and distressed by his mistaken confidence that the defendant

Jackson would be acquitted and he is /S/ trying to redeem that judgment by uncritically analyzing the affidavits and concluding that they would have had an effect on the outcome.

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34. The court concludes that the defendant, through his present counsel, has now had an opportunity to investigate the case thoroughly, even more thoroughly now with the benefit of hindsight.

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/S/

35. The court concludes that Mr. Howard's experience in defending murder cases exceeds that of the vast majority of

criminal defense attorneys /s/ and his performance at trial was above the performance of which most Alaska defense counsel are capable. He chose not to take advantage of a weekend to investigate because he was confident of his own skill and his client's persuasiveness. The evidence produced at the 3/25/87 /s/ hearing was neither of a substance nor from credible sources such that a reasonable trial lawyer would have spent his time searching for evidence of that quality rather than preparing cross-examination of state eye-witnesses or direct exam of his own eye-witnesses.

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36. Therefore, the court concludes that the defendant has not shown substandard performance by George Howard.

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/S/

39. Furthermore, the court concludes beyond a reasonable doubt, that the evidence produced the hearing would not have affected the verdict.

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37. The testimony of Calvin Chatman was incredible /s/ and, if presented at trial, would have helped the prosecution; any "failure" to investigate to find it was harmless beyond a reasonable doubt.

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/S/

38. The testimony by Brown and Cleveland about the victim's reputation for violence 1) was not credible and was based on experience with the victim years earlier and 2) would not have affected the verdict, because the victim's character had already been painted as unsavory by his presence in an after-hours bar and by his concealment of a firearm, among other trial testimony /s/.

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/S/

39. The testimony of Joubert and Louis Howard to prior statements by Albert Ford and Mary Stills went to impeachment

of them on minor points and, beyond a reasonable doubt, would not have affected the verdict.

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40. The court has also considered the cumulative effect of all of the evidence offered by Gregory Jackson at the hearing and concludes that the cumulative effect would not have affected the verdict /s/, but would almost certainly damaged defendant's case. /s/

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/S/

41. The court makes the following finds with respect to certain additional claims:

(a) As to the claim that Mr. Howard did not discuss with the defendant a

decision not to seek an instruction on manslaughter or any other lesser included offense or instructions with respect to the defenses of provocation or the heat of passion, the court finds that (1) Mr. Howard's testimony that he did in fact discuss those things with the defendant Jackson is credible (and Jackson's affidavit does not suffice to establish any question). /s/

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/s/ The court has had the opportunity to observe the (illegible) and otherwise assess the credibility of defendant Gregory Jackson, he is not credible /s/.

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/S/

(b) Mr. Howard's decisions about the instructions fall within the range of decisions a reasonable trial lawyer would have made (1) because he felt that self-defense would prevail and that the jury might compromise on a lesser-included offense rather than acquit if offered the choice and (2) because the defense of provocation or the heat of passion was inconsistent with the claim of self-defense.

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/S/

(c) Mr. Howard's decision not to voir dire on the question of race within the range of choices that a reasonable trial attorney might make.

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/S/

42. In deciding that the evidence offered at the post conviction hearing would not have affected the verdict, the court is relying upon its assessment of the credibility of the witnesses at trial; the events occurred in an after-hours club /s/ and the victim was found with a concealed weapon in his clothing following the shooting, so the victim's character was already well apparent to the jury even without additional character testimony; by the same token, the character of Albert Ford was equally apparent. Ford was thoroughly impeached at trial so

the marginal impeachment on his being "forced" to testify (which was wholly negated by his Crime Stopper's call) would not have affected a reasonable person's assessment of his credibility.

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43. For these reasons, the petition is denied.

So Ordered /S/

DATED at Anchorage, Alaska, this 7th day of April, 1987, at Anchorage, Alaska.

/S/J. JUSTIN RIPLEY
Superior Court Judge

EXHIBIT E.

WRITTEN ORDER OF AUGUST 24, 1984 OF THE SUPERIOR COURT OF THE STATE OF ALASKA IN STATE OF ALASKA V. GREGORY JACKSON, CASE NO. 3AN-S83-7223 CR. DENYING DEFENDANT'S MOTION FOR A NEW TRIAL DATED AUGUST 24, 1984 [APPEALED TO THE COURT OF APPEALS OF THE STATE OF ALASKA, FILE NO. A-805]

IN THE SUPERIOR COURT

FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT

STATE OF ALASKA,)
)
Plaintiff,)
)
vs.)
)
GREGORY JACKSON,)
)
Defendant.)
)

Case 3ANS-83-7223 Cr.

ORDER

Upon consideration of defendant's Motion for New Trial

IT IS ORDERED

that defendant's Motion for New

Trial is DENIED.

DATED at Anchorage, Alaska this 6th day of November, 1984.

/S/ J. JUSTIN RIPLEY
Superior Court Judge

EXHIBIT F.

MEMORANDUMS AND ORDERS OF THE SUPERIOR COURT OF THE STATE OF ALASKA IN STATE OF ALASKA V. GREGORY JACKSON, CASE NO. 3AN-S83-7223 CR. DATED DECEMBER 23, 1985 AND FEBRUARY 21, 1986 DENYING WITHOUT PREJUDICE DEFENDANT'S MOTIONS FOR POST-CONVICTION RELIEF AND MOTIONS FOR EVIDENTIARY HEARING AND FOR PRESENCE OF DEFENDANT PURSUANT TO REMAND OF THE COURT OF APPEALS OF THE STATE OF ALASKA, RULE NO. A-805 [APPEALED TO THE ALASKA COURT OF APPEALS, FILE NO. A-1471]

IN THE SUPERIOR COURT

FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

STATE OF ALASKA,)
)
Plaintiff,)
)
vs.)
)
GREGORY JACKSON,)
)
Defendant.)
)

Case No. 3ANS-83-7223 CR

MEMORANDUM AND ORDER

The Court has received this case

upon remand with the directive to conduct "further proceedings consistent with Hampton v. Huston, 653 P.2d 1058 (AK App. 1982), Barry v. State, 675 P.2d 1292 (AK App. 1984) and Wood v. Endell, Opinion No. 486." (AK App. June 18, 1985). The Court of Appeals also observed that "it appears [emphasis added] ... the court will be required to conduct a [Barry] hearing..." While that statement does not absolutely require a hearing, this Court desires to conduct one if appropriate. However, it is unclear just what the specific nature of the hearing should be, for I believe that a Barry/Hampton/Wood hearing has, in fact, been conducted.

This court is aware that the trilogy forbids summary disposition of Rule 35 ineffective assistance claims based upon the trial judge's assessment of observed conduct of counsel, as in Wood,

or without notice to petitioner and an opportunity to be heard, as in Hampton. However, in this case, though the Order was terse, the proceedings were not summary.

The record reflects that upon defendant's motion a hearing was held at which affidavits and unsworn documents were received and considered without objection by the State and without contention that they failed to establish a prima facie case. No material factual conflicts were asserted by the State nor was there a request to cross-examine defendant's witnesses. Barry, supra p.1296, headnotes 2 and 3. The hearing, premised upon the affidavits, consisted of argument of counsel. In due course the court found itself in agreement with the State that the decision not to call witnesses the likes of those proffered to

testify in accordance with the unsworn statements did not violate the standard of Risher v. State, 523 P.2d 421 (Alaska 1974). Indeed that choice, in my judgment, lay well within the range of decisions which might be expected to be made by skilled and experienced trial counsel.

Whether defendant's counsel breached his Risher duty by failing to locate and interview all the potential observers of this killing presented another question. The Court did not adopt the State's position that failure to investigate can be justified because defendant failed to fund retained counsel's investigative effort (assuming that to be the case here). Arnold v. State, 685 P.2d 1261, 1266 n.2 (Alaska App. 1984). However, the Court is aware of the trial record which reveals that the

patrons of the after-hours club immediately fled the scene of the shooting, virtually hurdling the body of the dying victim in their haste to disassociate themselves with the tragedy. Surely, their unwillingness to be interviewed was known to defendant who was acquainted with most or many of them, and this intelligence certainly was conveyed to his attorney. The Court concluded and still believes that the decision not to trace and interview patrons was, again a decision within the permitted range of Risher.

Finally, this court has considerable concern over the rapid development of the newly emerging issue of last resort, ineffective assistance of counsel. The Courts, even in their proper concern for the defendant's right of fair trial, should guard against the "perilous

process of second quessing" as condemned in People v. Pope, 590 P.2d 859, 867 (Cal. 1979). Although Pope was cited and quoted with approval in Barry, supra at 1296, the obverse of the following thesis, the admonition is as valid in the present context as in the former.

Seldom in the realm of human endeavor will any task be accomplished with such perfection that it can withstand ruthless dissection and intense partisan scrutiny under the pitiless and all-revealing illumination of hindsight. Particularly this is true where the process is repeated in renewed motions such as is the case here.

In short, there was a hearing, defendant made his record, counsel were heard and the Court has ruled. If the Court's failure to provide a memorandum decision or specific findings rendered the

Court of Appeals unsure whether the denial of defendant's motion was for technical or substantive reasons, the foregoing should clarify that point.

Counsel are advised that I am tentatively prepared to view this Memorandum supplementing this Court's November 6, 1984 Order as compliance with the higher court's requirement upon remand, and deny defendant's request for further hearing. This would place the issue of sufficiency of the former hearing respectfully but squarely before the Court of Appeals. So that I may have the benefit of counsel's thinking on these issues, however,

IT IS ORDERED:

1. That defendant shall move for a one-hour supplemental hearing, stating with particularity the issues he intends to address accompanied by offers

of proof as to the nature of the testimony he seeks to elicit and the witnesses through whom he would seek to introduce it;

2. That the State shall either oppose or join in the motion, and specifically address the admissibility and relevance of the proffered proof as well as the merits of the Motion for Supplemental hearing;

3. That, the State shall brief and come prepared to advise the Court thoroughly as to the basis and rationale for its concession on appeal that this Court's former dismissal/denial was erroneous; and

4. That if reference must be made to earlier pleadings or the record of former proceedings those matters may be attached as exhibits, but may not simply be incorporated by reference.

DATED at Anchorage, Alaska this 23nd day of December, 1985.

/S/
J. JUSTIN RIPLEY
Superior Court Judge

I certify that on 1/6/86
a copy of the above was mailed/
hand delivered to each of the
attorney and/or individuals at
their addresses of Record.
/S/

IN THE SUPERIOR COURT

FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

STATE OF ALASKA,
Plaintiff,
vs.
GREGORY JACKSON,
Defendant.

Case No. 3ANS-83-7223 CR

MEMORANDUM AND ORDER

In an attempt to clarify the post conviction proceedings in this case the Court issued its order of December 23, 1985. From the positions developed in the parties' subsequent pleadings it now appears that the Court's expectations were not practical and the intended simplification process was not workable.

Further, since the time this Court expressed its willingness to have its

December 23, 1985 Memorandum and Order presented to the Court of Appeals to cure the Rule 35(h)(2) defect, I have discovered that this process was suggested to that Court at page 9 of Appellee's Brief. The Court of Appeals in their Opinion declined to accept the State's suggestion. This Court, therefore, withdraws its proposal stated at page 3, paragraph 4 of the December 23, 1985 Memorandum and Order

Since the parties now disagree as to whether the defendant's record to this point has made out a prima facie case of ineffective assistance the Court finds it necessary to clarify that issue. I find defendant has not done so, and that the State's objections to the unsworn statements and affidavits presented are well taken. Whether the State waived these objections by failing to raise them

when the matter was originally argued, or whether the Court of Appeals, by its October 23, 1985 observation that a Barry hearing appeared to be required, intended to announce that a prima facie showing had been made are matters that have concerned this Court. Upon reflection, it is concluded that neither was the waiver, if any, effective, nor did the Court of Appeals establish the sufficiency of defendant's record to this point. Absent a specific directive to the contrary, it is most unlikely that the Court of Appeals intended to ignore the clear and mandatory language of Barry v. State, 675 P.2d 1292, 1294-1296 (Alaska App. 1984) and Hampton v. Huston, 653 P.2d 1058, 1060 (Alaska App. 1982) requiring affidavits upon personal knowledge. Therefore,

IT IS ORDERED that defendant's Motion to Calendar an Evidentiary Hearing and

Motion for an Order Directing Presence of Defendant are deemed Motions for Post Conviction Relief pursuant to Crim. Rule 35(c) and are DENIED without prejudice.

DATED at Anchorage, Alaska this 21st day of February, 1986.

/S/J. Justin Ripley
Superior Court Judge

EXHIBIT G.

PORTIONS OF TRANSCRIPT OF EVIDENTIARY HEARING REGARDING MOTION FOR NEW TRIAL HELD FEBRUARY 25, 1987 PURSUANT TO REMAND OF COURT OF APPEALS OF THE STATE OF ALASKA, FILE NO. A-805

IN THE SUPERIOR COURT

FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT

STATE OF ALASKA,)
)
Plaintiff,)
)
vs.)
)
GREGORY JACKSON,)
)
Defendant.)
)

Case No. 3AN-S83-7223 Cr.

TRANSCRIPT OF PROCEEDINGS

EVIDENTIARY HEARING REGARDING
NEW TRIAL
Wednesday, February 25, 1987,
2:45 p.m.
Anchorage, Alaska

DIRECT EXAMINATION OF GEORGE C. HOWARD

Q All right, Mr. Howard, there were -- there was no request made of record for instructions with respect to lesser included offenses or -- or other related offenses. Is there -- is there a reason that you chose not do that?

A Yes. It was a judgment call. In my opinion, Mr. Flippen, this was one of the strongest cases I've seen for-- for self-defense. I just did not think it wise for Mr. Jackson to gamble the jury returning a verdict finding him with some lesser offense. I was just -- I was satisfied that -- that the thing to do was to have the jury to call this case as a murder or let him go.

Q 'Kay. Mr. Howard, every single one of the witnesses in this case are-- are black.

Page 24, Lines 6-21

Q Mr. Gregory Jackson also writes, "At no time did Mr. Howard discuss with me" -- the next paragraph -- "a jury instruction on manslaughter or any other lesser included offense. At no time did I authorize him not to do so."

Paragraph 7: "At no time did Mr. Howard discuss with me foregoing instructions with respect to the defense of provocation and heat of passion. At no time did I authorize him not do so."

A As to the lesser inclu --

Q Yeah, let me ask a question.

A All right.

Q In the ordinary course of -- of our representing criminal defendants, do you -- do you engage them in decisions about lesser included defense --

A Yes.

Q -- instructions or heat of

passion instructions?

A Yes.

Q Did you in this case?

A I spoke to Mr. Jackson about the lesser included offense, but I quite frankly tell you that because of my strong feelings concerning the facts in the case, I did not put a great deal of emphasis upon it and I did not urge him to -- to do that. I recall mentioning it to him and I was satisfied that I was making the best judgment call when we decided on proceeding with the lesser included offense.

Page 31, Lines 3-25 and Page 32, Lines 1-5

EXHIBIT H.

AFFIDAVIT OF GEORGE C. HOWARD, ESQ., TRIAL COUNSEL AS TO INEFFECTIVE ASSISTANCE OF COUNSEL DATED SEPTEMBER 26, 1986

IN THE SUPERIOR COURT

FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

STATE OF ALASKA,
Plaintiff,
vs.
GREGORY JACKSON,
Defendant.

Case No. 3ANS-83-7223 CR

AFFIDAVIT OF GEORGE C. HOWARD, ESQ.

STATE OF ILLINOIS)
)ss.
COUNTY OF COOK)

George C. Howard, first duly sworn upon oath, deposes and states:

1. I am an attorney licensed to practice law in the state of Illinois since 1962.

2. I was Gregory Jackson's trial counsel in the above-referenced case. In that capacity I filed pre-trial discovery motions, serving them on the State of Alaska by U.S. mail well before the scheduled trial date. However, the State did not respond until the night before jury selection. A grand jury transcript was not provided until trial had actually begun, at which time I was afforded only a few minutes to read key testimony by the State's eyewitness.

3. Under these circumstances I nevertheless elected to proceed with trial based on my experience with similar cases I have tried in Illinois, and particularly in the city of Chicago. That decision was in part due to the fact that I am not admitted to practice in Alaska and am not familiar with local rules of procedure, nor do I have any detailed knowledge of

Alaska Criminal Law. I felt, however, that a trial is a trial whether in Alaska, or Chicago, and yielded to pressures to proceed with trial exercised by the State, the Bench and the general calendaring system in Anchorage, electing to rely on my experience in successfully defending similar cases.

4. Gregory Jackson has obviously suffered as a result of my miscalculations. In retrospect there is no doubt I should have moved for a continuance to better prepare this case, particularly with respect to an investigation geared toward finding witnesses who could support Mr. Jackson's version of the incident that led the charges against him, who could confirm the decedent's propensity for aggressiveness, and who might rebut, impeach or contradict the State's

witnesses.

5. I am familiar with general principles of law regarding impeachment of witnesses, instructions relating to lesser included offenses, self defense and other defenses to murder charges; however I am not familiar with Alaska law in any of these areas. For example, I was uncertain how issues such as provocation and heat of passion should be argued, or if they warranted a separate instruction.

6. Upon reflection it is clear to me these matters rendered my presentation of Mr. Jackson's case ineffective, and that he was certainly prejudiced thereby.

7. This affidavit is intended to supplement and expand on that affidavit previously submitted by me dated March 27, 1986.

DATED: 9/26/86 /S/ GEORGE C. HOWARD

SUBSCRIBED AND SWORN to before me

this 26th day of September, 1986.

/S/ CHERYL D. WELLINGTON
Notary Public in and for Illinois
My Commission expires: 8/26/90

EXHIBIT I.

MOTION FOR POST-CONVICTION RELIEF BASED ON INEFFECTIVE ASSISTANCE WITH SUPPORTING AFFIDAVITS DATED JUNE 4, 1986 INCLUDING AFFIDAVIT OF PETITIONER GREGORY JACKSON [MOTION AND AFFIDAVITS FILED AFTER REMAND OF THE ALASKA COURT OF APPEALS IN CAUSE NO. A-805 AND AFTER SUPERIOR COURT DISMISSED, ON FEBRUARY 21, 1986, MOTION FOR POST-CONVICTION RELIEF WITHOUT PREJUDICE]

IN THE SUPERIOR COURT

FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

STATE OF ALASKA,)
)
Plaintiff,)
)
vs.)
)
GREGORY JACKSON,)
)
Defendant.)
)

Case No. 3ANS-83-7223 CR

MOTION FOR POST-CONVICTION RELIEF BASED ON INEFFECTIVE ASSISTANCE OF COUNSEL AND MOTION TO CALENDAR EVIDENTIARY HEARING RELATING THERETO

Pursuant to this Court's "without

prejudice" Order of February 21, 1986, defendant hereby renews his motion for Post-Conviction Relief seeking a new trial based on ineffective assistance of counsel, and for an Evidentiary Hearing relating thereto.

These motions are based on all matters of record herein, and particularly the formalized affidavits of the following persons, each of which is attached and made a part hereof:

1. George C. Howard
2. Gregory Jackson
3. Hurist Joubert
4. Tyrone Brown
5. Larry Cleveland
6. Louis Howard
7. Calvin Chatman
8. John Hurd

These motions are further based on the Memoranda filed in connection with

defendant's earlier Rule 35 Motions, which documents are matters of record and appropriate for Judicial Notice, which is hereby formally requested.

DATED this 4th day of June, 1986.

BOYKO, DAVIS & DENNIS

By: /S/
THOMAS A. FLIPPEN, II

I certify that a copy
of the foregoing was mailed
to Robert D. Bacon, Assistant
Attorney General, on this
4th day of June, 1986.

/S/ THOMAS A. FLIPPEN, II

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

AFFIDAVIT

GEORGE C. HOWARD, first being duly sworn upon oath, deposes and says:

1. That my name is GEORGE C. HOWARD, of 188 West Randolph Street, Chicago, Illinois.

2. That I am a lawyer, licensed to practice in the State of Illinois, and have been so licensed since 1962.

3. That I was the trial lawyer for the defendant, GREGORY JACKSON, in the case of State of Alaska vs. Gregory Jackson, 83-07223-1.

4. That pursuant to my duties of Mr. Jackson's lawyer, I filed pre-trial discovery motions and served same upon the State.

5. The discovery materials

were not turned over to me until a few hours before the trial began.

6. A request had been made to have the discovery materials sent to my office in Chicago, Illinois, long before the trial began.

7. That no investigation was made by my office prior to the trial because the State did not furnish me with a list of witnesses, their statements, police reports, and other matters until the night before the trial.

8. That certain reports, including grand jury testimony, was not given to me until we were in the midst of trial, and only a few minutes were afforded to read same.

9. Affiant further states that a more adequate job of cross-examining the eye-witness for the State would have been done if the discovery material had been

furnished in sufficient time to make an investigation.

10. Affiant states that rather than proceeding with the trial, without an investigation after receiving the discovery material, he should have moved for a continuance in the case for reason of further and better preparation.

FURTHER, Affiant says not.

/S/ George C. Howard
Affiant

Subscribed and Sworn
to before me this
27th day of March, 1986.

/S/ Notary Public
My Commission Expires:
Dec., 18, 1988

IN THE SUPERIOR COURT

FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

STATE OF ALASKA,)
)
Plaintiff,)
)
vs.)
)
GREGORY JACKSON,)
)
Defendant.)
)

Case No. 3ANS-83-7223 CR

AFFIDAVIT OF GREGORY JACKSON IN SUPPORT OF MOTION FOR NEW TRIAL/POST-CONVICTION RELIEF

STATE OF INDIANA)
) ss.
_____ COUNTY)

Gregory Jackson first duly sworn upon oath deposes and states:

1. I am the defendant named above. At trial I was represented by George C. Howard, Jr., an attorney from Chicago, Illinois.

2. I conferred with Mr. Howard for

no more than approximately one hour when he appeared with me at my arraignment in Anchorage, Alaska. At that time I related to him the events that I subsequently testified to at trial.

3. I did not see Mr. Howard again, or otherwise communicate with him, until the day jury selection began in my trial. /During one of the breaks he specifically told me he had never received any police reports or other materials regarding my case until they were delivered to him at his hotel room in Anchorage the evening before jury selection began. He did not review a grand jury transcript in this matter until the Court recessed trial for him to do so.

4. Mr. Howard repeatedly told me, "you will be home soon", and that he undertook no investigation in this case because he regarded the facts as too weak

to support a conviction.

5. When I asked him how he located the only witness called on my behalf, a person also named Jackson, he specifically told me it was because he happened to have overheard the witness talking about the case outside the Courtroom, and that this encounter was strictly inadvertent.

6. At no time did Mr. Howard discuss with me any decision not to seek a jury instruction on manslaughter or any other lessor included offense. At no time did I authorize him not to do so.

7. At no time did Mr. Howard discuss with me foregoing instructions with respect to the defenses of provocation and heat of passion. At no time did I authorize him not to do so.

8. At no time did I specifically question Mr. Howard about any of these matters. Quite simply, he was the

attorney and I assumed he knew what he was doing. Anytime I in fact asked a question the consistent reply was words to the effect, "Don't worry, you'll be home soon."

DATED: 3/20/86 /S/ GREGORY JACKSON

SUBSCRIBED AND SWORN to before me this 20th day of March, 1986.

/S/
Notary Public in and for Indiana
My Commission Expires: 6/29/88

I certify that a copy of the foregoing was mailed to Robert D. Bacon, Assistant Attorney General, on this 4th day of February, 1986.

/S/ THOMAS A. FLIPPEN, II

IN THE SUPERIOR COURT

FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

STATE OF ALASKA,)
)
Plaintiff,)
)
vs.)
)
GREGORY JACKSON,)
)
Defendant.)

Case No. 3ANS-83-7223 CR

AFFIDAVIT OF HURIST JOUBERT

STATE OF ALASKA)
)ss.
THIRD JUDICIAL DISTRICT)

Hourist Joubert, first duly sworn upon oath deposes and states:

1. My name is Hurist Joubert. I have known Albert Ford for approximately two years and although we were not the ~~best of~~ friends, we were close acquaintances.

2. A couple of days after the

Jackson shooting I discussed the incidents with Ford. Ford stated that Jackson asked for it the night of the shooting. I asked Ford to clarify that statement and he stated that Vernon Jackson physically pressed the attack and forced Greg Jackson to protect himself. The bathroom was very small at Newkirks and Ford further indicated that Greg Jackson had no other way out.

3. At that time Ford had not been contacted by the authorities and he said that he would like to leave the state before the police talked to him because he did not want any involvement. He again told me Vernon Jackson had asked for it that night and further stated that under the same circumstances he would have shot Jackson. He said that he knew that he would be coerced to cooperate due to his criminal record. I advised him not to

run, that this was a murder case and that the authorities would locate him regardless.

4. The following day Ford told me that a representative from the District Attorney's Office and a police investigator talked to him. They told him that if he did not cooperate fully with them that charges would be filed against him. Ford is a heavy cocaine user who steals meat to support his habit.

5. On the day of the grand jury hearing I drove to the courthouse to give Al a ride home. When I arrived there the waiting room was filled with members of the black community, all of which I knew. Things proceeded slower than I thought they would and I was at the courthouse for over two hours. During that time, Alonzo Lang, the doorman at Newkirks, Al Ford, and myself talked about the testimony they

were about to give. Both Lang and Ford stated that pressure had been applied by the D.A.'s Office and APD to testify favorably on behalf of the State.

DATED: 4/15/86 /S/ HURIST JOUBERT

SUBSCRIBED AND SWORN to before me this 15th day of April, 1986.

/S/
Notary Public in and for Alaska
My Commission Expires: AS 33 30 190

IN THE SUPERIOR COURT

FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

STATE OF ALASKA,)
)
Plaintiff,)
)
vs.)
)
GREGORY JACKSON,)
)
Defendant.)
_____)

Case No. 3ANS-83-7223 CR

AFFIDAVIT OF TYRONE BROWN

STATE OF _____)
) ss.
_____ COUNTY)

Tyrone Brown, first duly sworn upon oath deposes and states:

1. My name is Tyrone Brown and I lived in Anchorage since 1978. I first met Vernon Jackson while in the army. We were stationed at Ft. Richardson and assigned to the same unit (B.C. 1/60 Inf.).

2. Jackson dealt cocaine while in the army and expanded his cocaine activities significantly after his discharge. As a matter of fact, he was one of the biggest narcotics dealers in the black community. Jackson was a violent man who most always carried a gun and he would not hesitate to use physical force when he felt it was necessary.

3. A couple of years ago I had to send my girlfriend to Hawaii for two weeks because her brother had some trouble with one of Jackson's friends and he (Jackson) threatened to harm her. I took the threat seriously and that is why I sent her away.

4. In 1982 Jackson asked me to sell cocaine for him, but I refused because I knew that someone would kill him sooner or later either because of his cocaine involvement or because of his violent temper.

DATED: 3/30/86 /S/ TYRONE BROWN

SUBSCRIBED AND SWORN to before me this 30th day of March, 1986.

/S/
Notary Public in and for Wisc.
My Commission Expires: 11/5/89

State of Wis.

County of Adams

IN THE SUPERIOR COURT

FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

STATE OF ALASKA,)
)
Plaintiff,)
)
vs.)
)
GREGORY JACKSON,)
)
Defendant.)
)

Case No. 3ANS-83-7223 CR

AFFIDAVIT OF LARRY CLEVELAND

STATE OF _____)
)ss.
_____ COUNTY)

Larry Cleveland, first duly sworn upon oath deposes and states:

1. My name is Larry Cleveland and I lived in Anchorage, Alaska since 1957 off and on.

2. I first met Vernon Jackson in 1978/79. He was a big narcotics dealer in the black community and I used to buy

qualities of cocaine from him myself. One time I wanted to purchase about $800 of cocaine and I had to stand in line. On some days Jackson would turn between $4,000 and $5,000 worth of cocaine.

3. Jackson carried a gun on many occasions, and I for one, believed he would use it. Violence was a part of Jackson's life and considering the business he was in it was just a matter of time before serious trouble came his way.

4. I have been in Newkirks on many occasions and it would be almost impossible to hear a conversation taking place in the bathroom if you were standing outside because the jukebox is almost always going and it is usually turned up very loud.

DATED: 3/4/86 /S/ LARRY CLEVELAND

SUBSCRIBED AND SWORN to before me this 5th day of March, 1986.

/S/
Notary Public in and for Alaska
My Commission Expires: 7/19/88

IN THE SUPERIOR COURT

FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

STATE OF ALASKA,)
)
Plaintiff,)
)
vs.)
)
GREGORY JACKSON,)
)
Defendant.)
)

Case No. 3ANS-83-7223 CR

AFFIDAVIT OF LOUIS HOWARD

STATE OF ALASKA)
)ss.
THIRD JUDICIAL DISTRICT)

Louis Howard, first duly sworn upon oath deposes and states:

1. My name is Louis Howard and I have known Vernon Jackson for over two years. I am a disc jockey at the Kamane Lounge, a black night-spot in Fairview. Jackson was one of the biggest narcotics dealers in Anchorage, was a violent man,

and almost always carried a gun.

2. On the morning of his death, Jackson was in the Kamane Lounge drinking Hennessey with a beer back. Jackson most always had friends with him and this morning there were four people that I can remember with him.

3. One of these friends, Mary Stills, told me that when Jackson entered Newkirks he did not have his gun with him because she had one in her purse and the other two people with them, Jesse and Ed had weapons with them. She stated that after a very short period of time Jackson returned to his car for his weapon. Mary says she knows he returned for his gun because when he came back into Newkirk's Jackson complained about the gun in the left inside pocket of his jacket next to his chest. He usually carried his gun in the front of his pants, but the metal was

cold that morning and maybe that is why he placed it into his jacket pocket.

4. I once lived with Albert Ford in 1982 for about four months. Al was a cocaine/heroin junkie and because he stole meat for dope he was known by the street community as the meat man.

DATED: 4/11/86 /S/ LOUIS HOWARD

SUBSCRIBED AND SWORN to before me this _____ day of February, 1986.

/S/ Ernest _____
Acting Superintendent
AS AUTHORIZED UNDER
A.S. 33.30.190

IN THE SUPERIOR COURT

FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

STATE OF ALASKA,)
)
Plaintiff,)
)
vs.)
)
GREGORY JACKSON,)
)
Defendant.)
)

Case No. 3ANS-83-7223 CR

AFFIDAVIT OF CALVIN CHATMAN

STATE OF ALASKA)
)ss.
THIRD JUDICIAL DISTRICT)

Calvin Chatman, first duly sworn upon oath deposes and states:

1. My name is Calvin Chatman and I have lived in Anchorage, Alaska since 1976.

2. I first met Vernon Jackson while in the army at Ft. Richardson in 1977. I was assigned to H.Q. 1/60 Inf. and Jackson

was in B.Co. 1/60 Inf. 172 BDE. At that time Jackson was selling between three and four thousand dollars worth of cocaine a month. I know this because I was purchasing three to four hundred dollars worth of cocaine a month and I was just one of many customers. Jackson was a big man and used his size to intimidate people. He was a violent man and would not hesitate to become physical.

3. I was discharged from the army at Ft. Riley, Kansas in 1981 and returned to Anchorage where I resumed contact with Jackson. He was still in the cocaine business and was one of the biggest suppliers of cocaine in the black community. I would estimate that he was selling $10,000 worth each month. Jackson was also pimping. He was running three to five girls and at fifty to three hundred and fifty dollars a pop he did well.

Jackson almost always carried a gun and displayed it on occasion.

4. On the night that Jackson was killed I was in Newkirks which is an after-hours place in Fairview. Newkirks is a small residence. The place was crowded and most everyone was drinking and using cocaine. The jukebox was on and very loud. It would be almost impossible to overhear a conversation taking place in the bathroom due to the loud music and the many conversations taking place. At approximately 3:00 a.m. Jackson came into Newkirks, said something to Greg Jackson's girlfriend and went into the bathroom. I'm not sure what happened after that, but I heard shots fired in the bathroom and moments later I went to the bathroom to see what had happened. I saw Jackson on the floor and old man Newkirk and a man called Dancing Bobby going through his

pockets. I thought it was kind of cold that those two people were ripping off a man who was still twitching, but then again Jackson was the type of person who most everyone tolerated out of fear. I had a feeling that Jackson would come to an untimely end because of his activities and his violent manner.

DATED: 6/2/86 /S/ CALVIN CHATMAN

SUBSCRIBED AND SWORN to before me this 2nd day of June, 1986.
/S/
Notary Public in and for Alaska
My Commission Expires: 8/14/88

IN THE SUPERIOR COURT

FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

STATE OF ALASKA,)
)
Plaintiff,)
)
vs.)
)
GREGORY JACKSON,)
)
Defendant.)
)

Case No. 3ANS-83-7223 CR

AFFIDAVIT OF JOHN HURD

STATE OF ALASKA)
)ss.
THIRD JUDICIAL DISTRICT)

JOHN HURD, first duly sworn upon oath deposes and states:

1. I am a private investigator licensed as such by the State of Alaska. I have been retained by the firm of Boyko, Davis & Dennis for sometime now with respect to Gregory Jackson's case, and personally spoke with Hurist Joubert,

Tyrone Brown, Larry Cleveland, Louis Howard and Calvin Chatman. The statements they signed, which now appear in full affidavit form, were true and correct summaries of the statements they gave to me. In each case I presented those written summaries to each of them, read the statements with each person, asked them if they fully understood the statement and if it correctly reflected their recollection of the incidents related therein, observed each such person to indicate affirmatively, and further observed each such person to sign and date his statement in my presence.

2. By way of further investigation into this matter I undertook efforts to locate one Mary Stills. I know her whereabouts and will be able to personally serve her with a subpoena requiring her to appear at any Evidentiary Hearing

scheduled in this case.

3. I did not attempt to take a formal statement from her as it is apparent she is a hostile and uncooperative witness. I did not want to alienate her or provide her any reason to flee or secrete herself.

DATED: 6/2/86 /S/ JOHN HURD

SUBSCRIBED AND SWORN to before me this 2nd day of June, 1986.
/S/
Notary Public in and for Alaska
My Commission Expires: 12/10/86

I certify that a copy of the foregoing was mailed to Robert D. Bacon, Assistant Attorney General, on this 4th day of June, 1986.

/S/ THOMAS A. FLIPPEN, II

EXHIBIT J.

MOTION FOR NEW TRIAL AND SUPPORTING DOCUMENTS AS TO INEFFECTIVE ASSISTANCE OF COUNSEL AND OTHER MATTERS DATED AUGUST 21, 1984

IN THE SUPERIOR COURT

FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

STATE OF ALASKA,)
)
Plaintiff,)
)
vs.)
)
GREGORY JACKSON,)
)
Defendant.)
)

Case No. 3AN-S83-7223 Cr.

MOTION FOR NEW TRIAL

Defendant, by and through his counsel of record, hereby moves this Court for all orders necessary to grant a new trial.

This motion is based on defendant's contention his conviction was the result of ineffective assistance of counsel, due

primarily to trial counsel's failure to investigate and to prepare defendant's case as more particularly set forth in the Memorandum of Points and Authorities served and filed herewith; on the attached affidavit of present counsel and on all matters of record herein.

This motion is brought pursuant to the provisions of Criminal Rule 35(c) (1) in that the ineffective assistance of counsel constitutes a violation of defendant's right under the Sixth Amendment to the United States Constitution and Article I, Sec. 7 of the Alaska Constitution; the provisions of Rule 35(c) (4) in that there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice, and as more particularly evidenced by the

attached witness statements, none of whom were ever contacted by prior defense counsel; and pursuant to the provisions of Rule 35(c) (6) in that the conviction is otherwise subject to collateral attack regarding the issue of ineffective assistance of counsel as heretofore available by Writ of Habeas Corpus.

DATED this 21st day of August, 1984.

BOYKO, DAVIS & DENNIS

By: /S/THOMAS A. FLIPPEN, II

I certify that a copy of the foregoing was hand delivered to Gail Roy Fraties, Esq. this 21st day of August, 1984.

/S/THOMAS A. FLIPPEN, II

IN THE SUPERIOR COURT

FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

STATE OF ALASKA,)
)
Plaintiff,)
)
vs.)
)
GREGORY JACKSON,)
)
Defendant.)
)

Case No. 3AN-S83-7223 Cr.

AFFIDAVIT OF THOMAS A. FLIPPEN, II

STATE OF ALASKA)
) ss.
THIRD JUDICIAL DISTRICT)

THOMAS A. FLIPPEN, II, being first duly sworn upon oath, deposes and says:

1. I am an attorney duly licensed to practice law before all courts in the states of Alaska and California, United States District Courts for the District of Alaska and the Northern District of California, the United States Court of

Appeals for the Ninth Circuit and the United States Supreme Court. I am an associate with Boyko, Davis & Dennis, defense counsel of record herein, and have been assigned primary responsibility for legal services rendered in this matter relating to sentencing and appeal. As a result of this assignment, I have become thoroughly familiar with all aspects of the case after having read transcripts of all proceedings through and including final argument at trial.

2. I have personally discussed this case on several occasions with Assistant District Attorney Gail Roy Fraties, trial counsel of record on behalf of the State of Alaska. From time to time I have personally informed him, and discussed with him in detail, the identity of those persons whose statements are attached hereto, and the nature and substance of

their statements.

3. Mr. Fraties has authorized me to state on his behalf that no discovery materials were requested by prior defense counsel herein until the day before jury selection began, and that once requested they were immediately provided.

4. In making final preparation for the presentation of his case, Mr. Fraties discovered that a copy of the grand jury transcript had not been requested by prior defense counsel. He therefore directed that efforts be made throughout the evening hours preceding the commencement of trial to deliver said transcripts by attempting to contact prior defense counsel at his room in the Captain Cook Hotel, where he had previously indicated he would be staying during the course of trial. These efforts were unsuccessful.

5. Mr. Fraties stated he was not

able to deliver the said grand jury transcripts to prior defense counsel until the day jury selection began. Please also see Tr. 179:13-25; 184:1-13; 257-15:258:16.

6. Although not specifically mentioned in the statements of witnesses attached hereto, I am personally aware that none of these persons was contacted by anyone in connection with this case prior to the time they were interviewed by John Hurd, an investigator retained by my office in an effort to locate and interview these persons. It is a matter of record that none of these persons were ever called to testify at the trial herein.

/S/ THOMAS A. FLIPPEN, II

SUBSCRIBED AND SWORN TO before me this 21st day of August, 1984.

/S/ Notary Public in and for Alaska
My Commission Expires: 9/9/84

I certify that a copy of the foregoing was hand delivered to Gail Roy Fraties, Esq. this 21st day of August, 1984.

/S/ THOMAS A. FLIPPEN, II

STATEMENT OF LARRY CLEVELAND

My name is Larry Cleveland and I have lived in Anchorage since 1957 off-and-on. I first met Vernon Jackson in 1978/79. He was a big narcotics dealer in the black community and I used to buy quantities of cocaine from him myself. One time I wanted to purchase about $800.00 of cocaine and I had to stand in line. On some days Jackson would turn between $4000 and $5000 worth of cocaine. Jackson carried a gun on many occasions and I, for one, believed he would use it. Violence was a part of Jackson's life and considering the business he was in it was just a matter of time before serious trouble came his way.

I have been in Newkirk's on many occasions and it would be almost impossible to hear a conversation taking place in the bathroom if you were standing

outside because the jukebox is almost always going and it is usually turned up very loud.

DATED this 13 day of July, 1984.

/S/LARRY CLEVELAND

This statement was read and signed in my presence.

/S/JOHN E. HURD

SUBSCRIBED AND SWORN to before me this 20th day of August, 1984.

/S/Notary Public in and for Alaska
My Commission Expires: 9/9/84

STATEMENT OF TYRONE BROWN

My name is Tyrone Brown and I have lived in Anchorage since 1978. I first met Vernon Jackson while in the army. We were stationed at Fort Richardson and assigned to the same unit (B.Co. 1/60 Inf.). Jackson dealt cocaine while in the army and expanded his cocaine activities significantly after his discharge. As a matter of fact, he was one of biggest narcotics dealers in the black community. Jackson was a violent man who most always carried a gun and he would not hesitate to use physical force when he felt it was necessary. A couple of years ago I had to send my girlfriend to Hawaii for two weeks because her brother had some trouble with one of Jackson's friends and he (Jackson) threatened to harm her. I took the threat seriously and that is why I sent her away. In 1982 Jackson asked me to sell cocaine

for him, but I refused because I knew that someone would kill him sooner or later either because of his cocaine involvement or because of his violent temper.

DATED this 13 day of July, 1984.

/S/TYRONE BROWN

This statement was read and signed in my presence.

/S/JOHN E. HURD

SUBSCRIBED AND SWORN to before me this 20th day of August, 1984.

/S/Notary Public in and for Alaska
My Commission expires: 9/9/84

STATEMENT OF LOUIS HOWARD

My name is Louis Howard I have known Vernon Jackson for over two years. I am a disc jockey at the Kahame Lounge, a black night-spot in Fairview. Jackson was one of the biggest narcotics dealers in Anchorage, was a violent man, and most always carried a gun.

On the morning of his death, Jackson was in the Kahame Lounge drinking Hennessey with a beer back. Jackson most always had friends with him and this morning there were four people that I can remember with him. One of these friends, Mary Stills, told me that when Jackson entered Newkirks he did not have his gun with him because she had one in her purse and the other two people with them, Jesse and Ed had weapons with them. She stated that after a very short period of time Jackson returned to his car for his

weapon. Mary says she knows he returned for his gun because when he came back into Newkirk's Jackson complained about the gun being so cold. It was November and Jackson had the gun in the left inside pocket of his jacket next to his chest. He usually carried his gun in the front of his pants, but the metal was cold that morning and maybe that is why he placed it into his jacket pocket.

I once lived with Albert Ford in 1982 for about four months. Al was a cocaine/heroin junky and because he stole meat for dope he was known by the street community as the meat man.

/S/LOUIS HOWARD

This statement was read and signed in my presence.

/S/JOHN HURD

SUBSCRIBED AND SWORN to before me this 20th day of August, 1984.

/S/Notary Public in and for Alaska
My Commission Expires: 9/9/84

STATEMENT OF HURIST JOUBERT

My name is Hurist Joubert. I have known Albert Ford for approximately two years and although we were not the best of friends, we were close acquaintances. A couple of days after the Jackson shooting I discussed the incidents with Ford. Ford stated that Jackson asked for it the night of the shooting. I asked Ford to clarify that statement and he stated that Gregory Jackson was attempting to back out of the situation but that Vernon Jackson physically pressed the attack and forced Greg Jackson to protect himself. The bathroom was very small at Newkirk's and Ford further indicated that Greg Jackson had no other way out. At that time Ford had not been contacted by the authorities and he said that he would like to leave the state before the police talked to him because he did not want any involvement.

e again told me Vernon Jackson had asked or it that night and further stated that nder the same circumstances he would have hot Jackson. He said that he knew that e would be coerced to cooperate due to is criminal record. I advised him not to un, that this was a murder case and that he authorities would locate him egardless.

The following day Ford told me that a epresentative from the District ttorney's Office and a police nvestigator talked to him. They told him that if he did not cooperate fully with them that charges would be filed against im. Ford is a heavy cocaine user who steals meat to support his habit.

On the day of the grand jury hearing I drove to the courthouse to give Al a ride home. When I arrived there the waiting room was filled with members of

the black community, all of which I knew. Things proceeded slower than I thought they would and I was at the courthouse for over two hours. During that time, Alonzo Long, the doorman at Newkirks, Al Ford, and myself talked about the testimony they were about to give. Both Lang and Ford stated that pressure had been applied by the D.A.'s office and APD to testify favorably on behalf of the state.

This statement was taken at the Cook Inlet Pretrial Facility by John E. Hurd.

/S/HURIST JOUBERT

This statement was read and signed in my presence.

/S/JOHN E. HURD

SUBSCRIBED AND SWORN to before me this 20th day of August, 1984.
/S/Notary Public in and for Alaska
My Commission Expires: 9/9/84

IN THE SUPERIOR COURT

FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

TATE OF ALASKA,)
)
Plaintiff,)
)
s.)
)
REGORY JACKSON,)
)
Defendant.)
)

ase No. 3AN-S83-7223 Cr.

AFFIDAVIT OF JOHN E. HURD

STATE OF ALASKA)
) ss.
THIRD JUDICIAL DISTRICT)

I, JOHN E. HURD, being first duly sworn, depose and state that:

1. I am a private investigator licensed by the State of Alaska.

2. I have been retained by Boyko, Davis & Dennis to assist with the investigation of Mr. Jackson's case. In connection with those duties I have had

frequent contact with Thomas A. Flippen, II in his capacity as substituted defense counsel, and with defendant Gregory Jackson.

3. Pursuant to my review of the case and discussion with Mr. Flippen and Mr. Jackson, I personally interviewed Hurist Joubert, Louis Howard, Larry Cleveland, Tyrone Brown and Calvin Chatman. In the course of each interview it became obvious and otherwise clearly apparent that none of these persons had previously been contacted or spoken to about the case by either the police or any person from Mr. Jackson's defense team. I may have specifically asked some of these persons a direct question to that effect, but I have no recollection of which person or on which occasion.

Dated this 20th day of August, 1984.

/S/John E. Hurd

SWORN AND SUBSCRIBED to before me this 20th day of AUgust, 1984.

/S/Notary Public in and for Alaska
My Commission Expires: 1/17/86

EXHIBIT K.

NOTICE OF MERIT AND SENTENCE APPEAL AND STATEMENT OF POINTS ON APPEAL TO THE COURT OF APPEALS OF THE STATE OF ALASKA DATED APRIL 21, 1987 AFTER FINAL DENIAL ON APRIL 7, 1987 BY SUPERIOR COURT OF RELIEF REQUESTED [RESULTING IN ALASKA COURT OF APPEALS FILE NO. A-2026, OPINION NO. 781]

IN THE SUPERIOR COURT

FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT

STATE OF ALASKA,)
)
Plaintiff,)
)
vs.)
)
GREGORY JACKSON,)
)
Defendant.)

Case No. 3AN-S83-7223 Cr.

Gregory Jackson
c/o Cook Inlet Pretrial Facility
1300 E. 4th Avenue
Anchorage, Alaska 99501

NOTICE OF MERIT
AND SENTENCE APPEAL

Defendant, by and through his counsel of record, hereby gives notice that he appeals to the Alaska Court of Appeals from this Court's denial of his motion for a new trial based on ineffective assistance of counsel, together with the Findings of Fact and Conclusions of Law in support of said denial, dated April 7, 1987.

Defendant further appeals from his sentence herein as excessive under the circumstances of his case.

DATED this 21st day of April, 1987.

BOYKO, DAVIS & DENNIS

By: /S/
THOMAS A. FLIPPEN, II

I certify that a copy of the foregoing was mailed to Leonard M. Linton, Assistant District Attorney, and the Attorney General in Juneau, on this 21st day of April, 1987.

/S/ THOMAS A. FLIPPEN, II

IN THE SUPERIOR COURT

FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT

STATE OF ALASKA,)
)
Plaintiff,)
)
vs.)
)
GREGORY JACKSON,)
)
Defendant.)
)

Case No. 3AN-S83-7223 Cr.

STATEMENT OF POINTS ON APPEAL

Defendant intends to rely on the following points with respect to his appeal, notice of which is served and filed herewith:

1. Defendant was denied effective assistance of counsel at trial and is therefore entitled to a new trial.

2. It was error for the trial court to deny defendant's motion for a new trial based on ineffective assistance of counsel.

3. The trial court's Findings

of Fact and Conclusions of Law were clearly erroneous and do not support the denial of defendant's motion for a new trial based on ineffective assistance of counsel.

4. The sentence herein was excessive and otherwise clearly mistaken based on the facts of this case.

DATED this 21st day of April, 1987.

BOYKO, DAVIS & DENNIS

By: /S/
THOMAS A. FLIPPEN, II

I certify that a copy of the foregoing was mailed to Leonard M. Linton, Assistant District Attorney, and the Attorney General in Juneau, on this 21st day of April, 1987.

/S/ THOMAS A. FLIPPEN, II

EXHIBIT L.

NOTICE OF APPEAL AND STATEMENT OF POINTS ON APPEAL TO THE COURT OF APPEALS OF THE STATE OF ALASKA DATED MARCH 21, 1986 AFTER DENIAL ON FEBRUARY 21, 1986 BY SUPERIOR COURT WITHOUT PREJUDICE RELIEF SOUGHT IN MOTION FOR NEW TRIAL [EXHIBIT F HEREWITH] RESULTED IN APPEAL NO. A-1471]

IN THE SUPERIOR COURT

FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT

STATE OF ALASKA,	)
	)
Plaintiff,	)
	)
vs.	)
	)
GREGORY JACKSON,	)
	)
Defendant.	)
	)

Case No. 3AN-S83-7223 Cr.

NOTICE OF APPEAL
(Appellate Rule 204(b))

Defendant hereby appeals to the Court of Appeals from this Court's Memorandum and Order dated February 21, 1986, denying

defendant's Rule 35(c) Motion for Post Conviction Relief based on ineffective assistance of counsel and for an evidentiary hearing with respect thereto, and the subsequent denial of a Motion to Reconsider dated March 4, 1986.

DATED this 21st day of March, 1986.

BOYKO, DAVIS & DENNIS

By: /S/
THOMAS A. FLIPPEN, II

I certify that a copy of the foregoing was mailed to Robert D. Bacon, Assistant Attorney General and Office of the Attorney General in Juneau, on this 21st day of March, 1986.

/S/ THOMAS A. FLIPPEN, II

IN THE SUPERIOR COURT

FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT

STATE OF ALASKA,
Plaintiff,
vs.
GREGORY JACKSON,
Defendant.

Case No. 3AN-S83-7223 Cr.

STATEMENT OF POINTS ON APPEAL
(Appellate Rule 210(e))

Defendant raises the following points on appeal:

1. After finding that written statements offered by defendant in support of his new trial motion were technically deficient, it was error for the Trial Court not to permit an opportunity to present those statements in technically

correct affidavit form.

2. It was error for the trial court not to calendar an Evidentiary Hearing with respect to defendant's new trial motion based on ineffective assistance of counsel and pursuant to remand from the Court of Appeals in Memorandum Opinion and Judgment No. 959 dated October 23, 1985.

DATED this 21st day of March, 1986.

BOYKO, DAVIS & DENNIS

By: /S/
THOMAS A. FLIPPEN, II

I certify that a copy of the foregoing was mailed to Robert D. Bacon, Assistant Attorney General and Office of the Attorney General in Juneau, on this 21st day of March, 1986.

/S/ THOMAS A. FLIPPEN, II

EXHIBIT M.

NOTICE OF MERIT APPEAL AND STATEMENT OF POINTS OF APPEAL DATED JANUARY 11, 1985 TO THE COURT OF APPEALS OF THE STATE OF ALASKA AS TO INEFFECTIVE ASSISTANCE OF COUNSEL AS A RESULT OF DENIAL BY THE SUPERIOR COURT OF MOTION FOR NEW TRIAL, SAID DENIAL DATED NOVEMBER 6, 1984 [RESULTING IN APPEAL NO. A-805]

IN THE SUPERIOR COURT

FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

STATE OF ALASKA,)
)
Plaintiff,)
)
vs.)
)
GREGORY JACKSON,)
)
Defendant.)
)

Case No. 3ANS-83-7223 CR

NOTICE OF MERIT APPEAL
AND SENTENCE APPEAL

Defendant, by and through counsel of record, hereby gives notice that he appeals to the Alaska Court of Appeals

from the Judgment of Conviction entered on December 14, 1984, from the denial of his Motion for a New Trial based on ineffective assistance of counsel and filed pursuant to the provisions of Criminal 35, and with respect to the sentence imposed herein as being excessive.

DATED this 11th day of January, 1985.

BOYKO, DAVIS & DENNIS

BY: /S/
THOMAS A. FLIPPEN, II

I certify that a copy of the foregoing was hand delivered to Gail Roy Fraties, Assistant District Attorney on this 11th day of January, 1985.

/S/ Thomas A. Flippen, II

IN THE SUPERIOR COURT

FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

STATE OF ALASKA,)
)
Plaintiff,)
)
vs.)
)
GREGORY JACKSON,)
)
Defendant.)
)

Case No. 3ANS-83-7223 CR

STATEMENT OF POINTS ON APPEAL

Defendant raises the following points on appeal:

1) His conviction was obtained in derogation of his Sixth Amendment right to effective assistance of counsel;

2) It was an error to deny Defendant's Motion for a new trial; and

3) The sentence of 50 years imposed herein pursuant to conviction for first degree murder was,

under the facts and circumstances of this case, excessive.

DATED this 11th day of January, 1985.

BOYKO, DAVIS & DENNIS

By: /S/
THOMAS A. FLIPPEN, II

I certify that a copy of the foregoing was hand delivered to Gay Roy Fraties, Assistant District Attorney on this 11th day of January, 1985.

/s/ THOMAS A. FLIPPEN, II

EXHIBIT N.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES WHICH THE CASE INVOLVES PURSUANT TO U.S. SUPREME COURT RULE OF APPELLATE PROCEDURE 21.7

CONSTITUTIONAL PROVISIONS

AMENDMENTS TO THE U.S. CONSTITUTION

ARTICLE V.

Rights of accused in criminal proceedings; due process; eminent domain. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grant jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property,

without due process of law; nor shall private property be taken for public use, without just compensation.

ARTICLE VI.

Right to speedy trial, witnesses, etc. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusations; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

ARTICLE XIV.

Sec. 1. Citizenship rights not to be abridged by states. All persons born or

naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 USCS SEC. 1257

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statues of, or commission held or authority exercised under, the United States.

ALASKA CONSTITUTION

Article I.

Declaration of Rights

Section 1. Inherent Rights. This constitution is dedicated to the principles that all persons have a natural right to life, liberty, the pursuit of happiness, and the enjoyment of the rewards of their own industry; that all persons have corresponding obligations to the people and to the State.

Section 7. Due Process. No person shall be deprived of life, liberty, or property, without due process of law. The right of all persons to fair and just treatment in the course of legislative and executive investigations shall not be infringed.

Section 11. Rights of Accused. In all criminal prosecutions, the accused shall have the right to a speedy and public trial, by an impartial jury of twelve, except that the legislature may

provide for a jury of not more than twelve nor less than six in courts not of record. The accused is entitled to be informed of the nature and cause of the accusation; to be released on bail, except for capital offenses when the proof is evident or the presumption great; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

ALASKA STATUTES

Sec. 11.41.100. **Murder in the first degree.** (a) A person commits the crime of murder in the first degree if, with intent to cause the death of another person, the person

(1) causes the death of any person; or

(2) compels or induces any person to commit suicide through duress or

deception.

(b) Murder in the first degree is an unclassified felony and is punishable as provided in AS 12.55 (Sec. 3 ch 166 SLA 1978).

Sec. 11.41.110(a)(1) reads in pertinent part:

(a) A person commits the crime of murder in the second degree if

(1) with intent to cause serious physical injury to another person or knowing that the conduct is substantially certain to cause death or serious physical injury to another person, the person causes the death of any person. ...

Sec. 11.41.120(a)(1) provides in pertinent part:

(a) A person commits the crime of manslaughter if the person

(1) intentionally, knowingly, or recklessly causes the death of another

person under circumstances not amounting to murder in the first or second degree.

Sec. 11.41.115 provides in pertinent part:

(a) In a prosecution under AS 11.41.100(a)(1) or 11.41.110(a)(1), it is a defense that the defendant acted in a heat of passion, before there had been a reasonable opportunity for the passion to cool, when the heat of passion resulted from a serious provocation by the intended victim.

(e) Nothing in (a) or (b) of this section precludes a prosecution for or conviction of manslaughter or any other crime not specifically precluded.

(f) In this section,

(2) "serious provocation" means conduct which is sufficient to excite an intense passion in a reasonable person in the defendant's situation, other than a

person who is intoxicated, under the circumstances as the defendant reasonably believed them to be; insulting words, insulting gestures, or hearsay reports of conduct engaged in by the intended victim do not alone or in combination with each other, constitute serious provocation.

Sec. 11.81.335 provides in pertinent part:

Justification: Use of deadly force in defense of self. (a) Except as provided in (b) of this section, a person may use deadly force upon another person when and to the extent

(1) the use of nondeadly force is justified under AS 11.81.330; and

(2) the person reasonably believes the use of deadly force is necessary for self defense against death, serious physical injury, kidnapping, sexual assault in the first degree under AS

11.41.410(a)(1) or (2), sexual assault in the second degree, or robbery in any degree.

(b) A person may not use deadly force under this section if the person knows that, with complete personal safety and with complete safety as to others, the person can avoid the necessity of using deadly force by retreating. ...

CRIMINAL RULES

Rule 30. Instructions.

(a) Requested Instructions--Objections. At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the

requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. Additionally, the court in its discretion may give the jury such instructions it deems necessary, at any stage of the trial. The instructions shall be reduced to writing and read to the jury and shall be taken to the jury room by the jury. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objections. Opportunity shall be given to make the objections. Opportunity shall be given to make the objection out of the hearing of the jury by excusing the jury or hearing objections in chambers.

(b) **Instructions to Be Given.** The

court shall instruct the jury on all matters of law which it considers necessary for the jury's information in giving their verdict.

(Amended by Supreme Court Order 222 effective December 15, 1975)

Rule 31. Verdict.

(c) **Conviction of Lesser Offense.** The defendant may be found guilty of an offense necessarily included in the offense charged, or of an attempt to commit either the offense charged or the offense necessarily included therein if the attempt is an offense. When it appears that the defendant has committed a crime, and there is reasonable ground of doubt in which of two or more degrees he is guilty, he can be convicted of the lowest of those degrees only.

EXHIBIT O.

PERTINENT PORTIONS OF PETITIONER'S APPELLATE BRIEFING FILED IN ALASKA COURTS ADDRESSING ISSUES OF FAILURE TO INSTRUCT ON MANSLAUGHTER AS A LESSER INCLUDED OFFENSE AND HEAT OF PASSION AS A DEFENSE.

A. PAGES, V. and 18-20 OF APPELLANT'S OPENING BRIEF IN GREGORY JACKSON v. STATE OF ALASKA, ALASKA COURT OF APPEALS FILE NO. A-805 of APRIL 16, 1985

IN THE COURT OF APPEALS FOR THE STATE OF ALASKA

GREGORY JACKSON,

Appellant,

vs.

STATE OF ALASKA,

Appellee.

Case No. A-805
Superior Court No. 3ANS-83-7223 CR

Appeal From Rulings By The Superior Court, Third Judicial District at Anchorage, Honorable J. Justin Ripley, Denying Defendant's Motion For A New Trial Based On Ineffective Assistance Of Counsel, And Appeal From the Sentence Imposed

APPELLANT'S OPENING BRIEF

Attorney for
Defendant/Appellant
Thomas A. Flippen, II
BOYKO, DAVIS & DENNIS
733 W. 4th Ave., Suite 400
Anchorage, AK 99501
(907) 272-5464

/S/ THOMAS A. FLIPPEN, II

FILED _____
in the Court of Appeals For
The State of Alaska.

DAVID A. LAMPEN,
Clerk of the Appellate Court

_____
Deputy Clerk

STATE OF ISSUES PRESENTED

1. Was Appellant denied effective assistance of counsel wherein trial counsel failed to investigate, failed to prepare, failed to request instructions on manslaughter as a lesser included offense and heat of passion as a defense, and failed to object to the Court's instruction that a unanimous acquittal was required before a lessor included offense could be considered? (emphasis added)

2. Was it error for the Trial Court not to hold a hearing with respect to appellant's ineffective assistance claim as required by Barry v. State, 675 P.2d 1292, 1295, (Ak. App. 1984)?

3. Was it error to deny Appellant's Motion For New Trial based on his allegation of ineffective assistance of

counsel?

. . .

-V-

. . .

In addition to the errors and omissions discussed above, trial counsel failed to ask for any lesser included offense instructions on manslaughter or with respect to a heat of passion defense. Although an instruction was given by the Court on second degree murder as a lesser included offense of first degree murder, defense counsel failed to request modification of the standard Alaska pattern jury instruction which stated that jurors were required to acquit on the greater offense before considering the lesser.

It is literally Horn Book law that on an accusation of murder in the first degree a jury may properly find the

defendant guilty of a lesser degree of murder or manslaughter. Wharton; Criminal Procedure (12th Edition) Sec. 545, 580. A defendant is entitled to such lesser included offense instructions if there is some evidence to support a jury finding that the State failed to prove one or more elements of a greater offense. Failure to so instruct should properly result in a new trial. Elisovsky v. State, 592 P.2d 1221, 1226 (Ak. 1979); Nathaniel v. State, 668 P.2d 851 (Ak. App. 1983); Maynard v. State, 652 P.2d 489 (Ak. App. 1982); Hartley v. State, 653 P.2d 1052, 1054-55 and fn. 2 (Ak. App. 1983). The same standards apply to instructions on potential defenses in that evidence produced at trial must be

supported by more than a scintilla of evidence but less than reasonable doubt.

A review of the Statement of Facts indicates quite clearly Mr. Jackson alleged he was provoked and acted in self defense. If the jury failed to agree that he acted in self defense, then the obvious question would be whether a reasonable person under the circumstances would have been provoked by the decedent's actions. There was no such instruction to this effect which, in tandem with the failure to instruct on manslaughter, literally precluded consideration of any defense which might lead to conviction of an offense less than murder.

Trial counsel further failed to secure Mr. Jackson any advantage which might have accrued from a simple request that the Court modify its instruction that

the jury must unanimously acquit on first degree murder before they could consider second degree murder. Modification of this instruction has recently been discussed by this Court in Staael v. State, _____P.2d _____, Ct. App. Opinion No. 454, published April 12, 1985; Dresnek v. State, _____ P.2d _____, Ct. App. Opinion No. 455, published April 12, 1985. It is also conceded that, standing alone, this may have constituted harmless error in that the defendant was found guilty of the greater offense, constituting implied rejection by the jury of the lesser included

offense. Christie v. State, 580 P.2d 310, 318 fn. 24 (Ak. 1978); see also Warton, Criminal Procedure (12th Edition) Sec. 545 at page 32 [If thedefendant could be convicted of a lesser offense, the jury should be instructed that, in case of a reasonable doubt between the degrees or offenses, it may convict of the lesser only; a general instruction that the defendant's guilt must be established beyond a reasonable doubt is not sufficient.]

It is respectfully submitted that the elements of manslaughter and the defense of provocation or heat of passion were clearly present in the defendant's account of the shooting incident. See AS 11.41.115. If not standing alone, then in combination with the errors and omissions

described above, the failure of defense counsel to request appropriate instructions deprived the defendant of his right to have the jury consider all possible theories of the case, and should result in remand for a new trial. In the alternative, it is contended failure to give such an instruction sua sponte was plain error (see Alaska Rule of Criminal Procedure 47(b); People v. Stewart, 544 P.2d 1317, 1321 (Cal. 1976). As it was both argued and supported by substantial evidence. Martin v. State, 664 P.2d 612 (Ak. App. 1982), cert. Den. _____ U.S. _____, 79 L.Ed. 234 (1984).

B. PAGES 1-3, 11-15 OF APPELLANT'S REPLY BRIEF IN GREGORY JACKSON v. STATE OF ALASKA, ALASKA COURT OF APPEALS NO A-805 OF APRIL 16, 1985

IN THE COURT OF APPEALS FOR THE STATE OF ALASKA

GREGORY JACKSON,

Appellant,

vs.

STATE OF ALASKA,

Appellee.

Case No. A-805

APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF ALASKA,
THIRD JUDICIAL DISTRICT AT ANCHORAGE

J. JUSTIN RIPLEY, JUDGE

APPELLANT'S REPLY BRIEF

Attorney for
Defendant/Appellant
Thomas A. Flippen, II
BOYKO, DAVIS & DENNIS
733 W. 4th Ave., Suite 400
Anchorage, AK 99501
(907) 272-5464

/S/ THOMAS A. FLIPPEN, II

FILED _____
in the Court of Appeals For
The State of Alaska.

DAVID A. LAMPEN,
Clerk of the Appellate Court

_____
Deputy Clerk

I
THE MERIT APPEAL

A. Remand For Statement Of Reasons Supporting Denial vs. Remand for Evidentiary Hearing Re Ineffective Assistance Of Counsel

The State has taken a position that, although Mr. Jackson's motion for a new trial based on ineffective assistance of counsel was properly denied, he is entitled to a statement of reasons for such denial and an opportunity to respond thereto. Hampton v. Huston, 653 P.2d 1058 (Ak. App. 1982).

Mr. Jackson takes the position that it was error for the trial court to deny his motion for a new trial because on its face it demonstrates ineffective assistance of counsel. If this court disagrees, however, the case should be remanded for an evidentiary hearing as

required by Barry v. State, 675 P.2d 1292 (Ak. App. 1984) with respect to at least the following potential questions:

1. Did trial counsel ever receive and review discovery materials, consisting of police reports and statements of witnesses eventually called at trial on behalf of the State? If so, when did trial counsel review those materials?

2. Is it true that trial counsel did not receive a

transcript of Grand Jury proceedings relating to testimony by the only eye witness and the only percipient witness until the day trial commenced? Is it therefore also true that his only reading of those transcripts occurred during a recess for that purpose which lasted no more than approximately 35 minutes?

3. Assuming trial counsel was aware appellant's version of the facts

differed materially from that stated by the eye witness and the single percipient witness, what steps, if any, did he take to investigate or otherwise seek support for appellant's account of the incident? [1]

4. Why did trial counsel fail to voir dire the jury with respect to possible racial bias and attitudes

---

[1] This point alone would seem to require an evidentiary hearing since "... on appeal it is contended that trial counsel could have discovered helpful evidence" but did not. Risher v. State, 523 P.2d 421, 425 fn. 20 (Alaska 1974).

concerning the black-on-black crime?

5. Did trial counsel understand that the defense of heat of passion was available? If so, why did he argue against the defense and fail to request an

appropriate instruction?

6. Did trial counsel understand that manslaughter was a lesser included offense of murder, and if so why or for what tactical reason did he fail to ask for instructions on manslaughter?

. . .

3. Failure to Request a Heat of Passion Instruction

Mr. Jackson further contends that failure to request a heat of passion instruction constituted ineffective assistance of counsel. The State suggests he would not have been entitled to such an instruction on the facts. Br. 19. The State's citation to Martin v. State, 664 P.2d 612 (Ak. App. 1983), cert. den. 104 S.Ct. 1001 (1984), and particularly the discussion at p. 617 of the commentary to the Illinois statute on which the Alaska defense of heat of passion and provocation

is based (As 11.41.115),[4] has been misapplied to the facts of this case when viewed in light of Mr. Jackson's testimony about the victim's

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[4] The fact that this aspect of Alaska law is directly based on an Illinois statute would seem to reinforce Mr. Jackson's argument that his trial counsel was unfamiliar with Alaska law, and even possibly unfamiliar with the parent statute from Illinois which is his state of admission and the location of his practice.

aggressiveness and assaultive behavior. See, e.g., Tr. 745:14-746:21; 747:4-21; 750:23-75-752:12; 754:2-12; 758:9-20; 759:9-760:21; and 772:22-773:13.

It is clear that a defendant is entitled to an instruction if he produces "some evidence" in the course of trial that will support consideration of the matter by the jury. The defendant's own testimony alone has been deemed sufficient for this purpose. Brown v. State, 698 P.2d 671, 673-674, citing Toomey v. State, 581 P.2d 1124, 1126 (Alaska 1978); Paul v. State, 655 P.2d 772, 775 (Ak. App. 1982); and Folger v. State, 648 P.2d 111, 113 (Ak. App. 1982). Mr. Jackson testified that the victim offered not only insulting words, but an aggressive demeanor and tone of voice coupled with a truculent forward movement and a reaching inside of

his coat to the breast pocket area. (See transcript references ante.) If not separately, these facts in combination arguably constitute assaultive behavior. Mr. Jackson's testimony further indicates this conduct resulted in a mutual quarrel or combat when he pinned the victim's hand against his chest, telling him to remove it from his breast pocket. Under such circumstances it appears Mr. Jackson was entitled to have the jury consider an

instruction based on heat of passion and provocation. [5]

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[5] If this aspect of the case is not regarded as ineffective assistance, it might be considered plain error for failure of the trial court to instruct on this issue sua sponte. Jackson's trial counsel did in fact argue heat of passion (855:7-856:13), then curiously disavowed it (Tr. 871:18-23). Failure to instruct was plain error only if the facts would have supported the instruction with some evidence, the burden of which is not heavy. Jacison's own testimony met that burden. Brown v. State, supra; Bidwell v. State, 656 P.2d 592, 594 (Ak. App. 1983); Ak. R. Crim. Pro. 47(b).

Further, plain error, if not ineffective assistance, appears by virtue of Judge Ripley's instruction that one is deemed to intend the natural consequences of knowing act. Tr. 905:22-906:3. Such language was disapproved in Sandstrom v. Montana, 442 U.S. 510 (1979), and Menard v. State, 578 P.2d 966, 968-69 (Ak. 1978). See also Malone v. State, 653 P.2d 662, 674-75 (Ak. App. 1982).

5. Acquittal Before Lessers

Lastly the State argues that is borders on the frivolous to suggest defense counsel was ineffective for failing to request modification of the trial court's instruction directing the jury not to consider any lesser included offense unless it first unanimously acquitted him of the greater offense, for example by proposing an instruction that the jury could consider lesser included offenses if it could not reach a unamious verdict on the greater offense. This issue was pending at the time of Jackson's trial and subsequently found to be without merit in Dresnek v. State, ____ P.2d ____, Alaska Appeals Op. No. 455 issued April 12, 1985. However, it should be noted that a petition

for review was filed with the Alaska Supreme Court on May 13, 1985, and remains pending under Action No. S-963. Further, the Ninth Circuit has taken position contrary to the holding in Dresnek:

> We join the Second Circuit in holding that although either formulation (i.e., an instructions on lesser included offenses, one directing the jury not to consider such matters absent an unanimous acquittal on the greater offense, and the other instructing that it may do so if unable after a reasonable effort to reach a verdict on the greater offense) may be employed if the defendant expresses no choice, it is error to reject the form timely requested by the defendant (citations omitted). U.S. v. Jackson, 726 F.2d 1466, 1469-70 (9th

Cir. 1984).

It would therefore seem that this issue remains alive and well, and that defense counsel's failure to provide a record that might benefit his client through future appellate rulings constitutes an additional facet of his constitutionally deficient performance.

C. PAGES 1, 9-10 OF PETITION FOR HEARING IN GREGORY JACKSON v. STATE OF ALASKA, ALASKA SUPREME COURT NO S-2626 OF FEBRUARY 2, 1988

IN THE SUPREME COURT FOR THE STATE OF ALASKA

GREGORY JACKSON,)
)
Petitioner,)
)
vs.)
)
STATE OF ALASKA,)
)
Respondent.)
)

Case No. S-2626

(Court of Appeals No. A-2026, Opinion No. 781)
(Superior Court No. 3ANS-83-07223 CR)

PETITION FOR HEARING
(Appellate Rule 302(a))
Prayer for Review

Petitioner seeks reversal of his conviction for first degree murder (AS 11.41.100) and a new trial, asserting that

he was denied the effective assistance of counsel.

. . .

-1-

B. Tactical Decisions Made Without Benefit of Investigation

Other courts have considered the relationship between trial counsel's failure to investigate and strategic or tactical decisions made in the course of trial:

> ...we conclude that while counsel's omissions might have been based on otherwise proper tactical considerations, nevertheless counsel acted without adequately investigating his client's defense. His decisions relative to the tactics available therefore were not 'informed' decisions... and so effectively deprived defendant of the presentation of a potentially meritorious defense.

People v. Shaw 674 P.2d 759, 762-63

(Cal. 1984). The U.S. Supreme Court has stated that "... strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgment supports the limitations on investigation." Strickland, 466 U.S. at 690-91.

Without citation to any authority, the intermediate appellate court suggests that defense counsel need not investigate if

the police have made "a very thorough investigation." Slip. Op. at p.7.

. . .

EXHIBIT P.

CERTIFICATE OF SERVICE
CERTIFICATE OF SERVICE BY MAIL

I hereby certify, that pursuant to Rule 21, Rule 28.2, Rule 28.5(b) and Rule 33 of the Supreme Court Rules of Appellate Procedure, that I am a member of the Bar of the U.S. Supreme Court in good standing, and that three copies of the foregoing Appendix to Petition for Writ of Certiorari to the Supreme Court of the State of Alaska and the Court of Appeals of the State of Alaska were served upon counsel for the Respondent/Plaintiff by depositing the same in the United States mail at Anchorage; Alaska, first class, postage pre-paid, addressed to:

Robert D. Bacon
Assistant Attorney General
Attorney General's Office
Special Prosecutions and Appeals
1031 West 4th Ave., Suite 318
Anchorage, Alaska 99501

and further that three copies of the

foregoing Appendix to Petition for Writ of Certiorari to the Supreme Court of the State of Alaska and the Court of Appeals of the State of Alaska were served upon the Attorney General of the State of Alaska by depositing the same in the United States mail, at Anchorage, Alaska, first class, postage pre-paid, addressed to:

Grace Berg Schaible
Attorney General
Attorney General's Office
Box "K"
Juneau, Alaska 99811

DATED at Anchorage, Alaska this 24th day of June, 1988.

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